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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 509

THE SEEBURG CORPORATION, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Seeburg Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on April 29, 1970, as modified by its Order of May 21, 1970, upon Seeburg's Petition for Rehearing.

OPINIONS BELOW

The opinion of the court of appeals is reported at 425 F.2d 124; it is reproduced as Appendix B (*infra*, pp. 2a-9a). The order of the Federal Trade Commission adopting findings and conclusions and deferring entry of final order, and accompanying opinion, are not officially reported; they are reproduced as Appendix D (*infra*, pp. 11a-42a). The final order and accompanying opinion of the Federal Trade Commission are not reported officially; they are reproduced as Appendices E & F respectively (*infra* pp. 43a-60a). The initial decision of the hearing examiner is not officially reported; it is reproduced as Appendix G (*infra* pp. 61a-173a).

JURISDICTION

The judgment of the court of appeals, which modified and affirmed the Order of the Federal Trade Commission, was entered on April 29, 1970 (Appendix B, *infra*, p. 2a). Upon a Petition for Rehearing, the Order of the court of appeals was modified on May 21, 1970 (Appendix C, *infra* p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1964).

QUESTIONS PRESENTED

(1) The Federal Trade Commission here nullified the decision of its hearing examiner who found that the challenged acquisition improved rather than impaired competition, and vacated without explanation 140 of his 229 detailed findings of fact, many of which contradicted its own conclusions. On review, the Court of Appeals for the Sixth Circuit enforced the Commission's order without considering or explaining the

conflicting vacated factual findings of the hearing examiner.

Accordingly, the question is whether, when an administrative agency on review of a hearing examiner's initial decision sets aside the examiner's detailed findings of fact based on record evidence, *without giving reasons* for doing so, a reviewing court may properly implement such an administrative agency action without evaluating the factual findings of the hearing examiner which conflict with the agency's ruling.

(2) Section 11(b) of the Clayton Act empowers the Federal Trade Commission to order a corporation found to have violated Section 7 to cease and desist from the violation and to "divest itself" of stock or assets unlawfully held. The question is whether, despite this Court's contrary precedent, contrary statutory language, contrary legislative history, and the Solicitor General's contrary advice to this Court in 1960, the FTC nevertheless now has blanket power under the Clayton Act to prohibit a corporation, on the basis of a single invalid acquisition, from making future acquisitions without advance FTC approval.

STATUTES INVOLVED

(1) Section 7 of the Clayton Act of October 15, 1914, 38 Stat. 731, as amended, 15 U.S.C. § 18 (1964), reads in pertinent part as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce

> in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

(2) Section 11(b) of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. § 21(b) (1964), provides as follows in pertinent part:

> If . . . the Commission . . . shall be of the opinion that any of the provisions of said sections [12, 13, 18 and 19 of Title 15c] have been or are being violated [by any person], it . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be . . . .

(3) Section 7(c) of the Administrative Procedure Act, 60 Stat. 243 (1946), as amended, 5 U.S.C. § 556(d) (Supp. V, 1965-69), provides in pertinent part as follows:

> A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence . . . .

(4) Section 10(e) of the Administrative Procedure Act, 60 Stat. 243 (1946), as amended, 5 U.S.C. § 706 (Supp. V, 1965-69), provides in pertinent part as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . . The reviewing court shall . . . hold unlawful and set aside agency

> action, findings, and conclusions found to be . . . unsupported by substantial evidence . . . . In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . .

STATEMENT OF THE CASE

This case is here on a petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review its judgment enforcing as modified the FTC's ruling that the 1963 acquisition of Cavalier Corporation (Cavalier) by The Seeburg Corporation (Seeburg) violated Section 7 of the Clayton Act, 15 U.S.C. § 18 (1964), and its order directing divestiture and banning future acquisitions.

Prior to the 1963 acquisition, Cavalier was a small, single line company with assets of less than $12 million and its entire facilities located in Chattanooga, Tennessee. It manufactured only bottle/can soft drink vending machines which it sold only to a single class of customers—company-owned and contract bottlers of Coca-Cola.[1] (App. G, p. 119a).

Because of its prior abortive efforts, Cavalier since 1957 had not solicited or sold its soft drink vending machines to "trade" bottlers, i.e., bottlers of non-Coca-Cola soft drinks such as Pepsi-Cola and 7-Up (App. G, pp. 119a, 127a-128a).

Seeburg, on the other hand, through its Choice Vend Division, manufactured and marketed bottle and can vending machines only to the "trade" bottlers (App.

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[1] Soft drink bottling firms bottle and distribute soft drinks made from syrup manufactured by the various soft drink syrup manufacturers. These bottlers are the principal customers of bottle/can soft drink vending machines. (App. G, pp. 80a-82a).

G, p. 119a). Despite repeated attempts, Seeburg had been unable to secure Coca-Cola approval of its soft drink vending equipment and was finally rejected in 1961 by the Coca-Cola parent syrup company. (App. G, pp. 120a-125a). This parent company approval was essential for a manufacturer to market successfully its soft drink vending equipment to the franchised and wholly owned bottlers of the Coca-Cola parent soft drink company. (App. G, pp. 84a-89a). Consequently, Choice Vend's sales force did not solicit Coca-Cola bottlers for their bottle and can vending machines business, and sold almost all of its vending machines to "trade" bottlers.[2] (App. G, p. 119a).

On April 22, 1966, the FTC filed its complaint charging that Seeburg's 1963 acquisition of Cavalier eliminated "[s]ubstantial actual and potential competition between" Seeburg and Cavalier and therefore violated Section 7 of the Clayton Act. (J.A. 8).[3]

After evidentiary hearings, the hearing examiner in a carefully documented 107-page opinion with 229 findings of fact found that, in light of the inability of Seeburg and Cavalier to compete for the patronage of the distinct customer classes of Coca-Cola and "trade" bottlers, "[n]o actual or potential competition existed between Seeburg and Cavalier at the time of the challenged transaction in 1963. . . ." (App. G, p. 155a). Finding instead that the "acquisition

[2] Seeburg's Choice Vend division did make sporadic sales of bottle vending machines to Coca-Cola bottlers. These sales, which occurred in the context of conventions, amounted to only 333 units over a three-year period and were characterized by the hearing examiner as "negligible." (App. G, p. 94a).

[3] "J.A. ——" citations are to the printed record in the court of appeals.

strengthened rather than lessened competition by enabling both Seeburg and Cavalier to diversify so as to serve customers they previously could not reach," (App. G, p. 155a) the examiner concluded that the acquisition not violate Section 7 and therefore dismissed the complaint. (App. G, p. 173a).

On appeal, the FTC vacated 140 of the hearing examiner's 229 findings of fact, and reversed the hearing examiner's decision. (App. D, pp. 11a-14a). Asserting its own conclusion that Seeburg faced no "insuperable obstacles in selling to Coca-Cola bottlers or in securing approval from the parent company" (App. D, p. 25a), the Commission ruled that "it was error for the examiner to find no actual or potential competition existed between respondent and Cavalier" (App. D, p. 22a), and therefore found the acquisition illegal.

Thereafter, with Commissioners Elman and Dixon dissenting, the FTC ordered Seeburg to divest Cavalier within one year (App. E & F, pp. 43a-60a), and enjoined Seeburg from acquiring, for a period of ten years, without prior FTC approval, "all or any part of the share capital or other assets of any corporation engaged in the manufacture and or sale of vending machines in the United States." (App. E, p. 45a).

On review, the Sixth Circuit affirmed the Commission's order of divestiture, concluding that "we see no way by which we can declare that the Commission's finding of actual and potential competition between Seeburg and Cavalier prior to the acquisition was not supported by substantial evidence on the whole record." (App. B, p. 6a).

While rejecting Seeburg's argument that the FTC had no power to ban future acquisitions, on the basis

of its recent decision in *Abex Corp.* v. *FTC*, 420 F.2d 928 (1970), the Sixth Circuit modified the FTC's ban to acquisitions of "all or any part of the share capital of any corporation engaged in the manufacture of vending machines, or capital assets pertaining to such manufacture" (App. B, pp. 8a-9a), and thereafter further limited the ban to such acquisitions "in the United States." (App. C, p. 10a).

REASONS FOR GRANTING THE WRIT

The first question presented raises an issue going to the heart of meaningful judicial review of administrative action—the role of the hearing examiner's findings of fact in the administrative process, and the weight given by reviewing courts to factual findings of the hearing examiner in assessing the substantiality of evidence supporting the agency's ultimate decision.

In the wake of this Court's *Universal Camera*[4] decision in 1951, reviewing courts of appeals appear hopelessly at odds. In particular, the ruling below conflicts with the recent decision by the Court of Appeals for the District of Columbia Circuit in *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970).[5]

As in *Cinderella*, the FTC here ignored crucial findings of the hearing examiner, vacating over 60 per cent of the examiner's factual findings, many of which conflicted with the FTC's conclusions, without offering reasons or explanations why these findings were vacated.

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[4] *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951).

[5] No petition for certiorari has been filed in the *Cinderella* case.

On review, the court of appeals all but ignored the crucial conflicting factual findings of the hearing examiner. Instead, the Court was content to quote from the FTC's opinion, and with scant analysis conclude that there was "substantial evidence" to support the FTC's conclusion of illegality.

By failing to consider the hearing examiner's findings or require FTC explanations for rejecting these findings, the court below sanctioned administrative action which undermines the judicial review guaranteed by the Administrative Procedure Act.

By contrast, the District of Columbia Circuit's *Cinderella* decision held that the FTC is not free to ignore the findings of the Examiner or to set aside his conclusions without giving its reasons for doing so. The court stated:

> "If [the reviewing Commissioners] choose to modify or set aside [the examiner's] conclusions they must state that they are doing so and they must give reasons for so doing. To hold otherwise is to ignore the objective of adversary proceedings before the Commission. Only if such rules are carefully adhered to can a reviewing court properly analyze the action taken by the Commission; only then can the wheat of meaningful agency action be separated from the chaff of arbitrary and capricious conduct." 425 F.2d at 589.

The court should grant this petition and reaffirm the responsibilities of the FTC and reviewing courts to give meaningful consideration to the factual findings of an independent hearing examiner. Unless the FTC is required to consider and to give reasons for vacating factual findings of the examiner, the safeguards afforded to administrative respondents by the

Administrative Procedure Act will become meaningless at the very time when the FTC's administrative procedures are coming under growing criticism and challenge.

The second question presented arises from the part of the Commission's final order, enforced by the court of appeals, which would prohibit Seeburg for ten years from engaging in future acquisitions relating to vending machines, without advance FTC approval. The question whether Section 11 of the Clayton Act grants to the Commission the power to ban future acquisitions in redressing a violation of Section 7 was expressly left open by this Court in *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 328 n. 9 (1961), in light of the Solicitor General's express advice that the FTC in merger cases could *only* order divestiture and was "*authorized to grant no other form of relief.*" Brief for the United States in Opposition to Motions to Affirm in *United States* v. *E. I. duPont de Nemours & Co.*, No. 55, O. T. 1960, p. 4 (emphasis added).

The Court should grant this petition and resolve this important question, in light of precedents, statutory text, legislative history, and previous advice by the Solicitor General which *uniformly* demonstrate that the FTC has *no* such authority in Section 7 cases.[6]

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[6] The same question is also presented by *Abex Corp.* v. *FTC*, 420 F.2d 928 (6th Cir. 1970), cert. filed, 38 U.S.L.W. 3444 (U.S. May 12, 1970) No. 146, O. T. 1970.

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN REGARD TO THE CONSIDERATION THAT A REVIEWING AGENCY MUST GIVE TO THE FINDINGS OF ITS HEARING EXAMINERS AND THE NEED FOR THE REVIEWING AGENCY TO GIVE REASONS FOR VACATING THOSE FINDINGS

The Administrative Procedure Act guarantees that agency decision-making in any administrative adjudication must be based on the entire record and must be supported by substantial evidence. 5 U.S.C. § 556 (d) (Supp. V, 1965-1969). Equally important, the APA protects these fundamental guarantees by charging reviewing courts with the responsibility of ensuring that the evidence supporting the agency's decision is indeed substantial when the record is viewed in its entirety, including the findings and conclusions of the administrative hearing examiner. 5 U.S.C. § 706 (Supp. V, 1965-1969); *Universal Camera* v. *NLRB*, 340 U.S. 474, 497 (1951).

Almost twenty years ago, this Court's pioneering *Universal Camera* decision recognized the growing importance and significance of administrative trial examiners. This Court stressed that "one of the important purposes of the movement for administrative reform" was "to increase the importance of the role of examiners in the administrative process," as evinced by the legislative history and provisions of the Administrative Procedure Act providing for "high standards of independence and competence in examiners." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 494 & 495 (1951).[7]

[7] Section 11 of the Administrative Procedure Act contains detailed provisions designed to maintain high standards of independence and competence in hearing examiners. Examiners are removable only for good cause established by the Civil Service Commission and are compensated by the Civil Service Commission,

Two decades later, the independent, impartial role of the hearing examiner foreseen in *Universal Camera* takes on ever greater significance in adjudications before agencies such as the Federal Trade Commission. For pursuant to current procedures of that agency, the same Commissioners who will ultimately decide the case following trial and the examiner's initial decision have already reviewed an *ex parte* report on the pre-trial merits investigation, and concluded that they have "reason to believe" that a violation of law has occurred—all before the complaint has even issued and adversary proceedings begun.[8]

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independent of agency ratings or recommendations. 5 U.S.C. §§ 7521, 4301(2)(E), 5335(a)(B), 5362 (Supp. V, 1965-69). Moreover, Section 5(c) of the APA provides that the hearing examiner may not be "responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d) (Supp. V, 1965-69).

[8] For example, in the instant case the Federal Trade Commissioners issued a formal complaint on April 22, 1966 which stated that:

> "The Federal Trade Commission has reason to believe that The Seeburg Corporation, a corporation, has acquired the assets of Cavalier Corporation, a corporation, in violation of Section 7 of the Clayton Act (15 U.S.C. Sec. 18), as amended . . . ." (J.A. 4).

Prior to issuance of the complaint, efforts by Seeburg to settle the case had been rejected by the same Commissioners because "Seeburg would be obtaining the fruits of an acquisition alleged to be illegal . . . ." (J.A. 281). Thus the Commissioners had considered the merits of this case at least twice before it came to them on appeal from the examiner's initial decision.

[9] Such unfairness was aggravated here by the FTC's arbitrary and discriminatory practice to grant private audiences on settlement proposals to the favored few, without published criteria. See *Seeburg Corp., et al.* v. *FTC, et al.*, 1966 Trade Cas. ¶ 71,955 at 83,382-83 (E.D. Tenn. 1966), approved by the court below. (App. B, p. 9a); J.A. 75 n.12, 295-98, 321, 389.

Conceding this inherent unfairness in the Commissioners' dual roles, FTC Commissioner Elman has recently acknowledged:

> These subtle conflicts in the Commission's role as both prosecutor and judge could be minimized by changes in Commission practice which should have been adopted long ago to assure greater fairness and efficiency in Commission proceedings. First, policing and prosecutorial functions in specific cases should be delegated to the Commission's staff; second, much greater deference should be accorded to the procedural rulings and findings of hearing examiners on disputed issues of fact turning solely upon evaluation of the evidence in a particular record.
>
> Whether there is evidence in the investigative files sufficient to support the factual allegations in a proposed complaint recommended by the staff is not the sort of policy matter which requires the personal consideration of Commission members. Delegation of authority to make such determinations to high staff officials would avoid having Commission members act as prosecutor and judge in the same case and at the same time free them for more important and essential tasks. Similarly, the independence of hearing examiners and their isolation from the complaint-issuance process is an added safeguard against unfairness, and deferring to their judgment on simple procedural and factual issues would liberate the Commission from the arduous process of inquiring into the facts unnecessarily or considering time-consuming interlocutory appeals on subsidiary matters. Statement of Commissioner Philip Elman in Hearings on Federal Trade Commission Procedures Before Subcomm. on Administrative Practice and Procedure of the Senate Comm.

on the Judiciary, 91st Cong., 1st Sess., at 35 (1969).[2]

So long as current FTC procedures are not reformed, the hearing examiner plainly is the most objective and may well be the only truly impartial person to sit in administrative judgment of the merits of an FTC adjudication. For that reason his findings based on the evidence presented before him should, at a minimum, be given the most careful regard.

But despite the particularly significant role of an independent FTC hearing examiner, reviewing courts in the wake of the Supreme Court's 1951 *Universal Camera* pronouncement are now hopelessly divided on the regard to be given to the findings of FTC hearing examiners in assessing the substantiality of the evidence supporting the Commissioners' decision.

Thus, some circuit courts of appeals focus on "credibility," and conclude that when "[t]here is no question of credibility presented" they "are entitled to minimize the weight of the hearing examiner's findings . . . ." *Advertising Specialty Nat'l Ass'n* v. *FTC*, 238 F.2d 108, 113 & n. 2 (1st Cir. 1956); see also *Mannis* v. *FTC*, 293 F.2d 774, 776 (9th Cir. 1961). By contrast, other courts give significant weight to the hearing examiner's findings, even when they involve no questions of credibility. See, e.g., *Snap-On Tools Corp.* v. *FTC*, 321 F.2d 825 (7th Cir. 1963); cf. *Burke Golf Equip. Corp.* v. *NLRB*, 284 F.2d 943, 944 (6th Cir. 1960)

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[2] The fact that the Federal Trade Commissioners have initiated and reviewed the investigation, and, at least to some extent, overseen the prosecution, has led many commentators to question, in terms of due process fairness, whether the Commission has in fact "prejudged" cases that it will later hear on appeal from the examiner's initial decision. See, e.g., Berger, *Removal of Judicial Functions From Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 Mich. L. Rev. 199, 206-11 (1960).

("Where the Board and the Trial Examiner are not in agreement, the evidence must be examined with greater care by the Court.")

One circuit court of appeals actually requires the Commission to accept the hearing examiner's findings, so long as those findings themselves are supported by the evidence. In *Minneapolis-Honeywell Reg. Co.* v. *FTC*, 191 F.2d 786, 790 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952), the Seventh Circuit concluded that "while the findings of an examiner are not 'as unassailable as a master's' [citation omitted] where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary." See also *Snap-On Tools Corp.* v. *FTC*, 321 F.2d 825, 837 (7th Cir. 1963). Other courts view the hearing examiner's findings as a small piece of the mosaic, concluding that "the pattern and frame-work of the whole enterprise must be taken into consideration." *Art Nat'l Mfg. Distrib. Co.* v. *FTC*, 298 F.2d 476, 477 (2d Cir.) *cert. denied*, 370 U.S. 939 (1962), *Goodman* v. *FTC*, 244 F.2d 584, 601 (9th Cir. 1957).

In this case, however, the court below not only gave little or no weight or consideration to the findings of the hearing examiner,[10] but also sanctioned the FTC's own failure to give reasons for vacating those findings.

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[10] To the extent the court mentioned the hearing examiner's opinion at all, its treatment was enigmatic.

First, the court apparently dismissed the hearing examiner's decision with the erroneous and immaterial announcement that "[w]e do not believe that this case turns on the credibility of witnesses." (App. B, p. 3a).

Next, apparently troubled by whether the Commissioners' decision was based on the whole record, the court opined "[n]or do

Thus, the court below with scant analysis quoted at length from the Commissioners' opinion and concluded that "we see no way by which we can declare that the Commission's findings of actual and potential competition between Seeburg and Cavalier before the acquisition was not supported by substantial evidence on the whole record." (App. B, p. 6a). After that, the court was content to incant that the FTC's opinion was "supported by substantial evidence". (App. B, p. 6a).

Yet the court below was faced with an FTC decision which vacated 140 out of 229 of the hearing examiner's findings of fact with virtually no explanation.

Among those vacated were crucial findings by the examiner relating to the historical dichotomy between suppliers of soft drink vending machines for Coca-Cola and "trade" bottlers (App. G, pp. 82a-93a), the need for approval by a parent syrup company (App. G, p. 89a), the difficulties facing Seeburg Choice Vend in obtaining Coca-Cola parent syrup company approval of its machines (App. G, pp. 119a-122a), and the difficulties Cavalier faced in selling machines to the "trade" bottler segment (App. G, pp. 127a-128a).

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we think the Commission failed to review the entire record." (App. B, p. 3a).

Finally, the Court reached the unsupportable conclusion that the "Commission's rejection of the ultimate findings of the Hearing Examiner [apparently his conclusion that the acquisition was legal] in this case were based upon legal conclusions drawn from essentially undisputed facts after careful review of the whole record. This it clearly has the authority to do. *Universal Camera* v. *NLRB*, 340 U.S. 474, 492-97 (1951)." (App. B, p. 3a).

But at no point in its opinion does the court below suggest that it *considered* the hearing examiner's findings to assess the substantiality of the evidence supporting the Commissioner's decision.

On the basis of these vacated factual findings, among others, the hearing examiner concluded that "[n]o actual or potential competition existed between Seeburg and Cavalier at the time of the challenged transaction in 1963 . . . ." (App. G, p. 155a).

But, on appeal, the Commissioners vacated the findings of the hearing examiner without bothering to give record references, reasons, or explanations, and in direct conflict with the examiner's vacated findings proceeded to "find" that Seeburg faced no "insuperable obstacles in selling to Coca-Cola bottlers or in securing approval from the parent company" (App. D, p. 25a), and to "find" that "Cavalier's decision to stop soliciting bottlers other than Coca-Cola in 1957, apparently arose primarily from considerations of its own business convenience rather than from economic conditions making such sales impossible." (App. D, p. 25a n. 8).

Given such basic and crucial conflicts between the factual findings of the FTC hearing examiner and those of the Commissioners, the failure of the court below to consider and/or explain the import (or lack thereof) of the hearing examiner's rejected findings, or to require FTC explanations for rejecting those findings, totally defeats the meaningful judicial review contemplated by the APA and this Court's instructions in *Universal Camera*.

By contrast, as the Circuit Court for the District of Columbia admonished in its recent *Cinderella* decision:

> We do not say that the Commission must find an examiner's findings of fact and conclusions of law "clearly erroneous" before overturning an initial decision, but we do say that *it must consider that decision and the evidence in the record upon which*

> *it is based*, rather than dismissing the proceedings at the hearing out of hand. To hold otherwise would put us in an impossible situation: the substantial evidence test as explained in *Universal Camera* requires us to review all of the record in determining whether the agency's decision is supported by substantial evidence, yet the Commission contends that it has the power to make an independent determination without reference to the evidence. We hardly think it permissible for the Commission to draw such independent conclusions, while ignoring the record and consequently converting the entire hearing proceeding into a meaningless exercise, leaving it for the court to review the record to find whether there is evidence to support those conclusions. (*Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 588 (D.C. Cir. 1970) (emphasis added).

Unless reviewing courts insist that the Commissioners give reasons for rejecting crucial factual findings of hearing examiners, courts of appeals will continue to face an insurmountable task and will be left to speculate as did the court below: "[n]or do we think that the Commission failed to review the entire record" (App. B, p. 3a); and to intone that there is "substantial evidence" (App. B, p. 6a), without explaining or even considering why the key and conflicting factual findings of an experienced hearing examiner who presided over the trial and heard the testimony of witnesses were rejected *en masse* by the Commissioners.

This is surely not the meaningful judicial review guaranteed by the Administrative Procedure Act as confirmed by this Court's *Universal Camera* decision. Rather, judicial sanction of the slipshod administrative decision-making evidenced in this case can only deprive parties in administrative proceedings of any

semblance of the judicial protection from preconceived and arbitrary agency action, and castrate the hearing examiner's stature contemplated by the APA.

Two decades after *Universal Camera*, amid a deep crisis of confidence in the administrative process, it is both urgent and timely for this court to reassess the interplay between hearing examiners and Commissioners in administrative adjudication, and to articulate criteria to reconcile the existing conflicts among the courts of appeals.

II. DISREGARDING THIS COURT'S CONTRARY PRECEDENT, CONTRARY STATUTORY LANGUAGE, CONTRARY LEGISLATIVE HISTORY, AND THE SOLICITOR GENERAL'S CONTRARY ADVICE TO THIS COURT IN 1960, THE COURT BELOW UPHELD THE FTC'S USURPATION OF POWER TO ENJOIN FUTURE ACQUISITIONS ON THE BASIS OF A SINGLE CHALLENGED ACQUISITION.

The sole statutory delegation of remedial power to the FTC in Section 7 merger proceedings is contained in Section 11 of the Clayton Act, 15 U.S.C. § 21(b), which authorizes the Commission to redress violations by ordering the acquiring company "to cease and desist from such violations, and divest itself of the stock or other share capital, or assets, held . . . ."

Furthermore, from 1914 to 1962—for almost half a century—the courts, the Federal Trade Commission, and the Solicitor General have unanimously agreed that Congress did *not* give the FTC blanket power under the Clayton Act to ban *future* acquisitions.

Interpreting the FTC's remedial powers under the Clayton Act, this Court in 1934 held that "Section 11 specifies *the* remedy which the Commission may apply, *namely*, that it may, after hearing, order the violator to divest itself of the stock held contrary to the terms

of the Act." *Arrow-Hart & Hegeman Electric Co.* v. *FTC*, 291 U.S. 587, 594-95 (1934) (emphasis added); see also *FTC* v. *Western Meat Co.*, 272 U.S. 554, 559 (1926). This Court further emphasized in its *Arrow-Hart* decision, 291 U.S. at 598:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but that accomplished, has not the additional powers of a court of equity to grant other and further relief . . . ."

The 1950 amendments to the Clayton Act, 64 Stat. 1125, broadened the Commission's remedial power by granting authority to order divestiture of corporate *assets* as well as stock. But these amendments did not upset this Court's *Arrow-Hart* holding that the Commission "has not the additional powers of a court of equity to grant other and further relief . . . ." 291 U.S. at 598.

Indeed, in recognition of the fact that Congress had *not* granted the FTC the broad equity power to ban future acquisitions in either 1914 or 1950, the Commission in 1956 requested Congress to amend Section 11 of the Clayton Act to empower the Commission, upon finding a Section 7 violation, to "take such other and additional steps as are necessary to restore competition . . . ." Hearings on H.R. 6748, H.R. 7229, and H.R. 8332 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 2d Sess. at 30-31 (1956).

Testifying for the entire Commission as to the need for the proposed amendment, Chairman Gwynne con-

firmed the limited grant of power in Section 11 of the Clayton Act when he explained that "we are restricted, now to an order of divestiture." Hearings on H.R. 6748, H.R. 7229, and H.R. 8332 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 2d Sess., at 3536 (1956).

The amendment sought by the Commission to broaden its remedial powers under Section 11 of the Clayton Act was never reported out of Committee.

Recognizing the Congressional intention that the FTC not have blanket power to enjoin future acquisitions in Section 7 cases, the Solicitor General in 1960 advised this Court that:

> In a proceeding by the Federal Trade Commission to enforce Section 7, Section 11 of the Clayton Act gives the Commission no discretion in choice of remedy—if it finds a violation of Section 7, it "shall issue" an order requiring the offender to "divest itself of the stock . . . held" contrary to Section 7's provisions. The Commission is thereby commanded to order stock divestment and, as held in *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554, and *Arrow-Hart & Hegeman Electric Co.* v. *FTC*, 291 U.S. 587, *it is authorized to grant no other form of relief* (emphasis added). Brief for the United States in Opposition to Motions to Affirm in *United States* v. *duPont & Co.*, No. 55, O.T. 1960, p. 4 (footnote omitted).

Further acknowledging its lack of power to enjoin future acquisitions under the Clayton Act, the FTC in recent years has sought to prove that a *string* of illegal acquisitions might be an "unfair method of competition" under Section 5 of the FTC Act, supporting an injunction against future acquisitions un-

der that statute. See, e.g., *Foremost Dairies, Inc.*, 60 F.T.C. 944, 948, 1023-28, 1091-92 (1962).

Most recently, however, the FTC has jettisoned all prior limitations and precedents in an activist quest for broad new powers, above and beyond its Congressional authorization. Thus, in *Luria Bros. and Co.*, 62 F.T.C. 243, 635-38 (1963), without discussing the statutory source of such extraordinary power, the FTC for the first time arrogated to itself the power to ban future acquisitions under the Clayton Act in a contested Section 7 proceeding.[11]

This year, the Sixth Circuit's opinion in *Abex Corp.* v. *FTC*, 420 F.2d 928 (1970), was the first contested instance resulting in a judicial determination that the Federal Trade Commission can ban future acquisitions under the Clayton Act. In *Abex*, the

[11] Since 1963, the Commission has entered similar orders in a number of litigated cases. See, e.g., *Ekco Products Co.*, 65 F.T.C. 1163 (1964); *Beatrice Foods Co.*, CCH Trade Reg. Rep. (1967-67 Trans. Binder) ¶ 17,398 (1965); *National Tea Co.*, CCH Trade Reg. Rep. (1965-67 Trans. Binder) ¶ 17,463 (1966); *Dean Foods Co.*, CCH Trade Reg. Rep. (1965-67 Trans. Binder) ¶ 17,765 (1966); *United States Steel Corp.*, 3 CCH Trade Reg. Rep. ¶ 18,626 (1968); *Mississippi River Fuel Corp.*, 3 CCH Trade Reg. Rep. ¶ 18,801 (1969).

In its *Ekco Products* decision, the Commission attempted to justify the imposition of a ban on future acquisitions by asserting that "the Commission's powers to grant relief in respect of unlawful corporate acquisitions are broadly equitable; ...." 65 F.T.C. at 1215.

The question of the Commission's power to ban future acquisitions under Section 11 was not contested on judicial review in *Luria Bros. and Co.* v. *FTC*, 389 F.2d 847 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968), and *Ekco Products Co.* v. *FTC*, 347 F.2d 745 (7th Cir. 1965). In neither of these cases was this question presented to the court of appeals. See Brief for Petitioner in *Luria*, No. 14,402, 3d Cir., p. 149; Brief for Petitioner in *Ekco*, No. 14,773, 7th Cir.

Sixth Circuit, without analysis, simply ruled: "We read the statute [Section 11] as authority for the remedy chosen by the Commission." 420 F.2d at 933.

This Court should grant this petition and clarify once and for all whether the Federal Trade Commission has been granted blanket Congressional authority under Clayton Act, Section 11, to ban future acquisitions.

If such power is arguably needed by the Commission in single acquisition cases, it is more appropriate for Congress to weigh such need against the harshness and cumbersome administration of such power by the FTC, and to decide whether it is wise to vest blanket power in the Federal Trade Commission—and if so, to provide guidelines for the exercise of that power in appropriate cases.[12]

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[12] By contrast, the Department of Justice, which concurrently enforces Clayton Act Section 7 by *judicial* proceedings, Clayton Act, Section 15, 15 U.S.C. § 25, seeks court decrees against *future* acquisitions on a *selective* basis in special cases, rather than by the rote and boilerplate orders endemic at the FTC. Cf. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 480 (1952) (Dissenting Opinion of Justice Jackson); *FTC* v. *Henry Broch & Co.*, 368 U.S. 360 (1962).

Also, in both *Abex* and the instant case, the court below found it necessary to clarify and restrict the scope of the FTC's blanket order banning future acquisitions. *Abex Corp.* v. *FTC*, 420 F.2d 928, 933 (6th Cir. 1970); App. B, p. 6a. Still the order here remains vague and imprecise. Depending on what is meant by "capital assets pertaining to such manufacture," the order may ban purchases of almost any asset from a firm which manufactures vending machines, including used equipment, land and abandoned buildings.

Compliance with such a broad, imprecise order is not a mere illusory inconvenience which can be corrected by a telephone call to the FTC. For under the FTC's Rules of Practice any request for approval to acquire any asset under such an order must be

CONCLUSION

The issues presented by this petition are of urgent significance in the proper functioning of the administrative process, now riven by conflicting and inconsistent judicial criteria governing hearing examiners' findings under the Administrative Procedure Act, and to the proper implementation of antitrust laws and remedies by the FTC.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 7, 1970

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placed in the public record for thirty days for comments by interested parties before the FTC will make a decision. Federal Trade Commission Rules of Practice, § 3.61(e), 16 C.F.R. § 3.61(e) (1970). See also *Continental Baking Co.*, Dkt. 7880 (FTC, Oct. 30, 1969) (Continental Baking Company required to follow this procedure in order to purchase two items of used bakery equipment), and see *Continental Baking Co.*, Dkt. 7880 (FTC, July 16, 1970) (same procedure to purchase one piece of used bakery equipment).

Moreover, should Seeburg guess wrong as to what is prohibited by the order, civil penalties await in the amount of $5,000 per violation and in the case of a continuing violation, $5,000 per day. See Clayton Act, Section 11(l), 15 U.S.C. § 21(l) (1964).

APPENDIX

APPENDIX A

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

April 29, 1970

Kirkland, Ellis, Hodson, Chaffetz,
Masters & Rowe
800 World Center Building
Washington, D. C.

Chambliss, Chambliss & Hodge
1111 Maclellan Building
Chattanooga, Tennessee

Mr. J. B. Truly
Assistant General Counsel
Federal Trade Commission
Washington, D. C.

Re: The Seeburg Corporation vs.
Federal Trade Commission
No. 19,673

Gentlemen:

Enclosed is a copy of the Court's opinion which was announced today in the above-entitled case.

A judgment in conformity with the opinion has been entered today as required by Rule 36.

Yours very truly,

CARL W. REUSS, *Clerk*

GRACE KELLER
Chief Deputy

Opinion of Court Below

APPENDIX B

No. 19673

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petition to Review an Order of the
Federal Trade Commission

THE SEEBURG CORPORATION, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Decided and filed April 29, 1970

Before: EDWARDS, PECK and McCREE, Circuit Judges.

EDWARDS, Circuit Judge. Petitioner seeks review of an order of divestiture and an injunction against further similar acquisitions entered by the Federal Trade Commission (FTC) after hearings before a Hearing Examiner. The undisputed evidence shows that prior to 1963, both The Seeburg Corporation and Cavalier Corporation were substantial manufacturers of automatic coin vending machines for canned and bottled soft drinks, and that in that year, Seeburg acquired Cavalier and has been operating its facilities as a part of its organization ever since.

The Commission found that prior to the date of the acquisition of Cavalier, Seeburg and Cavalier were actual and potential competitors; that the appropriate markets for consideration of adverse effect of the merger upon competition were the overall market consisting of manufacturers of vending machines and a submarket of manufacturers of bottle vending machines; that before Seeburg's acquisition of Cavalier, Seeburg accounted for 13.8 per cent of the overall market and Cavalier accounted for 5.1 per cent of this market, and that after the acquisition, the combined Seeburg-Cavalier Corporation accounted for 18.9 per cent of this market. As to the bottle vending machine submarket, the Commission found these same percentages to

be 15.6, 9.4 and 25 per cent, respectively. The Commission thereupon found that the Cavalier acquisition by Seeburg might have an adverse effect upon competition within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18 (1964), which provides in part as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

On this petition for review, Seeburg's first appellate argument concerns its contention that the record does not support FTC's findings that prior to the acquisition of Cavalier, Seeburg was an actual or a potential competitor of that company. It relies heavily upon the findings favorable to it of the Hearing Examiner which the Commission overruled.

We believe petitioner's argument in this regard is not well founded in either fact or law. We do not believe that this case turns on the credibility of witnesses. *Cf. Ohio Associated Telephone Co.* v. *NLRB*, 192 F.2d 664 (6th Cir. 1951). Nor do we think the Commission failed to review the entire record. *Cf. Cinderella Career & Finishing School, Inc.* v. *Federal Trade Commission*, — F.2d — (D.C. Cir. 1970). (Decided March 20, 1970). The Commission's rejection of the ultimate findings of the Hearing Examiner in this case were based upon legal conclusions drawn from essentially undisputed facts after careful review of the whole record. This it clearly has the authority to do. *Universal Camera* v. *NLRB*, 340 U.S. 474, 492-497 (1951).

Petitioner seeks to convince us that there was a submarket among the manufacturers of coin operated vending machines for bottled drinks consisting exclusively of suppliers to the Coca-Cola Company bottlers. Seeburg's point is that it has not succeeded in becoming such a supplier, that Cavalier was a Coca-Cola machine supplier, and was exclusively engaged in manufacture of machines for the Coca-Cola Company. On this issue the Commission found:

> "The evidence shows that Seeburg's Choice-Vend Division whose equipment at the time had not been approved by the parent Coca-Cola Company sold bottle and can vending machines to Coca-Cola bottlers as well as to other bottlers in the period 1961 through 1965. Choice-Vend, most of whose bottle vending machine business consisted of selling to the so-called 'trade' bottlers, may well have preferred to sell more than it did to Coca-Cola bottlers upon approval by the parent company. The fact remains, nevertheless, that for the period 1961 through 1965, on an overall basis, its sales to Coca-Cola bottlers did increase. Although these sales approximated .3% of the total purchases of such equipment of Coca-Cola bottlers in 1963, transactions in excess of eighty thousand dollars cannot be accurately characterized as negligible as they were by the initial decision. It was error for the hearing examiner to give no effect as a practical matter to evidence of competition where it exists.
>
> "As a matter of fact, Seeburg prior to the acquisition made strenuous efforts to secure approval of its machines by the Coca-Cola Company and to sell this equipment to Coca-Cola bottlers. Respondent does not deny that fact, but in effect contends, and the examiner agrees, that because it was unsuccessful in securing approval from the parent company and because its sales to these bottlers were not as large as it might like, that it did not compete with Cavalier which had a sub-

stantial portion of the Coca-Cola bottler business. The examiner's finding that there was no competition between respondent and the acquired firm will be vacated. Where two firms sell essentially the same product to the same type of customers, even though one of the vendors by virtue of its relationship with a group of customers is more successful with that group than the other, then such suppliers must nevertheless be regarded as competing with each other. Although Coca-Cola in the period preceding the acquisition may have desired to limit the number of its 'approved suppliers' this does not detract from our finding on this point. The fact that a supplier may meet a certain amount of sales resistance by some customers or groups of customers has never hitherto been considered as a justification for fragmenting the product market according to the customers sold by different suppliers. As the Supreme Court noted in another context 'Unsuccessful bidders are no less competitors than the successful one.' It is the purpose of Section 7 to preserve buyers the choice arising out of such competition.

"The evidence further indicates that Seeburg/Choice-Vend was able in the period preceding the acquisition to make its sales presentation to Coca-Cola officials and to have its machines tested by the Coca-Cola laboratories for their operational characteristics, such as refrigeration.

"The record shows and the examiner so found that on February 5, 1962, Coca-Cola Company advised Seeburg that, although it was confident respondent would make a good supplier, approval had not been granted since Seeburg did not meet Coca-Cola's requirements for approval of new suppliers . . . ." (Footnotes omitted.)

We do not think that as a matter of law competition is restricted entirely to instances of success. *See United States*

v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660-61 (1964). Seeburg had repeatedly sought to become a Coca-Cola supplier, and, indeed, made a major presentation to the Coca-Cola Company during December of 1961 seeking formal approval of the parent company. It clearly had the facilities and the know-how to compete directly with Cavalier in the exact market which Cavalier was serving.

Cavalier was a somewhat smaller organization in volume of business. It had established a good sales relationship with the Coca-Cola Company, and after 1957 did no business outside of that relationship. But the record also seems to indicate that Cavalier had the capacity and the know-how to compete in all aspects of the coin vending machine soft drink business and that its decision to limit its sales efforts to Coca-Cola was a matter of its own convenience. Under the factual situation recited above, we see no way by which we can declare that the Commission's finding of actual and potential competition between Seeburg and Cavalier prior to acquisition was not supported by substantial evidence on the whole record. 5 U.S.C. § 706 (Supp. IV, 1965-68).

Nor do we agree that the Commission erred in either fact or law in its description of the market or submarket which it employed for the determinations referred to above. The critical elements to be considered in determining a valid product market are set forth thus in the leading case, *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294 (1962):

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such prac-

tical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." *Brown Shoe Co., Inc.* v. *United States, supra* at 325. (Footnotes omitted.)

The overall market and the submarket found by the Commission may readily be described in terms of these criteria —but significantly, the submarket contended for by Seeburg (one consisting solely of Coca-Cola bottlers) cannot be, except by reference to the single characteristic of "distinct customers." The findings of the Commission concerning the relevant markets are affirmed.

It seems clear to us that there is substantial evidence of a trend toward economic concentration in both the overall vending machine manufacturing field, where in 1963 five firms did 67.1 per cent of the business, and in the submarket consisting of the manufacturing of bottle vending machines, where in the same year five firms did 78.3 per cent of the business. It also seems clear that there is substantial evidence to support the Commission's conclusion that the Cavalier acquisition by Seeburg might substantially lessen competition within the meaning of Section 7 of the Clayton Act in that it tends to eliminate a competitive entity and to increase already great concentration in "oligopolistic" markets. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

Discussing Section 7 of the Clayton Act, the Supreme Court has said:

> "Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

We have no question but that under the broad powers Congress has given the FTC and on the record in this case, divestiture is an appropriate remedy, since only by this method can Cavalier be restored as a separate competitive entity to the defined markets. *Abex Corporation* v. *FTC*, — F.2d — (6th Cir. 1970). (Decided January 8, 1970).

The last material issue presented by this case concerns the breadth of the Commission's order, which follows:

> "It Is Further Ordered that respondent shall for a period of ten (10) years from the date of service of this order, cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, all or any part of the share capital or other assets of any corporation engaged in the manufacture and/or sale of vending machines in the United States."

Since Seeburg has shown a proclivity for repeated acquisitions, the prospective portion of the Commission's order is deemed appropriate. *Abex Corporation* v. *FTC*, *supra*.

However, as we have indicated, the adverse effect on competition of the Seeburg-Cavalier merger was on the manufacturing of vending machines. While the FTC has wide latitude in remedying such violations, its order must be reasonably related to the violation found. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). The present order may be read as prohibiting Seeburg's acquisition of any company which merely (and perhaps incidentally) sells vending machines.

The order of the Federal Trade Commission is therefore modified to read:

> "It Is Further Ordered that respondent shall for a period of ten (10) years from the date of service of this order, cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, all or any part of the share capital of any corporation engaged in the manufacture of vending machines, or capital assets pertaining to such manufacture."

See Abex Corporation v. *FTC*, *supra*.

We have examined Seeburg's argument that it was somehow denied due process of law or its rights under the Administrative Procedure Act by the fact that the FTC denied Seeburg a hearing on its contention that the complaint in this case should not issue and denied Seeburg discovery of Commission files pertaining to its (Seeburg's) proposed consent decree. These motions clearly did not apply to an adjudicatory stage of this proceeding. We believe both contentions are insubstantial and have been adequately answered in the opinion of the Commission dated October 25, 1966, and in the District Court for the Eastern District of Tennessee on Seeburg's suit for declaratory judgment and mandamus. *Seeburg Corp.* v. *FTC*, Civil Action No. 4861 (Dec. 8, 1966).

As modified above, the order of the Federal Trade Commission is affirmed and enforced.

APPENDIX C

No. 19,673

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE SEEBURG CORPORATION, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Order

Before: EDWARDS, PECK and McCREE, *Circuit Judges.*

On reading and considering petitioner's petition for rehearing in the above-styled matter, and

Noting that the words "in the United States" were inadvertently omitted therefrom,

The order is hereby amended by adding said words after the words "vending machines" in paragraph (d) thereof.

Entered by order of the Court

/s/ CARL W. REUSS
Clerk

Filed May 21, 1970 Carl W. Reuss, Clerk

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

DOCKET No. 8682

In the Matter of

THE SEEBURG CORPORATION, a corporation.

Order Adopting Findings and Conclusions and Deferring Entry of Final Order

FINDINGS OF FACT

The Commission adopts the following findings contained in the initial decision:

1. The "STATEMENT AND HISTORY OF PROCEEDINGS" beginning on page 1 and ending with the second full paragraph on page 2.

2. The findings of fact contained in paragraphs 1 through 12 on pages 7 to 11 (the footnote on page 7 is excluded).

3. Paragraph 13 on page 11, which is modified by deleting therefrom that part beginning with the phrase "as part of" and ending with the phrase "(Coleman, Tr. 2092)."

4. Paragraph 14 on page 12 (including footnote 6 on page 13), which is modified to read as follows:

> Seeburg acquired in February 1960 substantially all the assets of the Choice-Vend Corporation, which manufactured bottle and can vending machines.

5. Paragraphs 15 through 20 on pages 13 and 14.

6. Paragraph 21 on page 14, whose last sentence is modified to read as follows:

> Cavalier's only attempt to sell to other than Coca-Cola bottlers, the so-called "trade" bottlers, which began in 1955, was abandoned in 1957.

7. Paragraphs 22 through 32 on ~~pages 14 to~~ 16.

8. Paragraph 33 on page 17, which is modified to read as follows:

> 33. *The Vendo Company.* At the time of the challenged acquisition in 1963, Vendo manufactured a complete line of vending equipment, including machines which dispense hot and cold drinks, hot and cold foods, candy, snacks, cigarettes, coffee and pastry that sold to all classes of vending machine customers with sales of $39,347,470 and 82,248 units. In the same year Vendo's sales of bottle vending machines in the United States totalled $16,705,300 and 46,836 units.

9. Paragraphs 34 through 49 on pages 17 through 20.

10. Paragraph 55 on page 22.

11. Paragraphs 56 through 72 on pages 23 to 27.

12. Paragraph 154 on pages 54 and 55, which is modified to read as follows:

> Seeburg entered the vending machine manufacturing industry in 1958 when it acquired Eastern Electric Company, Inc.'s cigarette machine and, as of 1963, manufactured and sold the following types of coin-operated vending machines: cigarette machine, batch brew coffee machine, single cup vending machine, single cup coffee machine, and a nonfood all purpose merchandiser.

13. Paragraph 156 on page 55.

14. Paragraph 160 on page 56.

15. Paragraph 161 on page 56, which is modified to read as follows:

> On at least six occasions Coca-Cola evaluated Choice-Vend or Seeburg Choice-Vend bottle and can vending equipment and rejected such equipment for various reasons, including inadequate refrigeration performance.

16. Paragraphs 165 through 171 on pages 57 through 60.

17. Paragraph 196 on page 68, which is modified to read as follows:

> In July 1966, Coca-Cola revised its equipment approval policy for bottle and/or can vending equipment, notified several formerly unaccepted vending machine manufacturers of this change, and invited them to submit equipment for testing.

18. Paragraphs 197 through 203 on pages 68 through 70.

19. Paragraph 210 on page 75 which is modified to read as follows:

> Westinghouse Electric Corporation in the latter half of 1966 set up a sales organization to call on bottlers other than Coca-Cola bottlers.

20. Paragraphs 211 and 212 on page 75.

The Commission's other findings of fact are set forth in the accompanying opinion. Those portions of the initial decision not specifically adopted by this order are vacated.

Conclusions

1. The Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. Section 7 of the Clayton Act, as amended, prohibits any merger or corporate acquisition where the effect in any line of commerce in any section of the country may be to substantially lessen competition or to tend to create a monopoly.

3. Vending machines in general and bottle vending machines are the appropriate lines of commerce within which to evaluate the probable competitive effect of the acquisition of the Cavalier Corporation by respondent.

4. The effect of the acquisition of the Cavalier Corporation by The Seeburg Corporation may be substantially to lessen competition in the production and sale of vending machines and bottle vending machines, in violation of Section 7 of the Clayton Act, as amended.

ORDER

IT IS ORDERED that those findings of the initial decision specified in the Findings of Fact above be, and they hereby are, adopted by the Commission.

IT IS FURTHER ORDERED that the findings of fact and conclusions of law contained in the accompanying opinion be, and they hereby are, adopted as additional findings and conclusions of the Commission.

IT IS FURTHER ORDERED that all portions of the initial decision not specifically adopted above be, and they hereby are, vacated.

IT IS FURTHER ORDERED that complaint counsel and counsel for respondent shall each file, within thirty (30) days after the receipt of this order, a proposed form of order and briefs in support thereof, in accordance with the directions contained in the accompanying opinion.

IT IS FURTHER ORDERED that entry of a final order in this matter be deferred until further order by the Commission;

By the Commission. Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

SEAL

ISSUED: July 15, 1968

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

DOCKET No. 8682

In the Matter of

THE SEEBURG CORPORATION, a corporation.

Opinion of the Commission

By Commissioner MacIntyre:

The Commission's complaint, issued April 22, 1966, challenged the acquisition of the Cavalier Corporation (Cavalier) by another vending machine manufacturer, The Seeburg Corporation (Seeburg), as a violation of Section 7 of the Clayton Act, as amended. This matter is now before the Commission on complaint counsel's appeal from the initial decision dismissing the complaint.

It may be noted at the outset that the parties and the hearing examiner seem to have no fundamental disagreement on the basic facts shown by this record, but differ essentially on the legal significance of those facts and the inferences and conclusions which may be drawn therefrom. The examiner and respondent on the one hand and complaint counsel on the other also differ widely on the proper interpretation of Section 7.

Both Seeburg and Cavalier sell and manufacture vending machines defined in the complaint as "any coin-operated electronic or mechanical device which dispenses a product."

Seeburg has a relatively broad line of vending machines, including can and bottle vending machines for dispensing soft drinks.[1] Cavalier on the other hand was a single line company concentrating on the production and sale of can and bottle vending machines for the soft drink trade.

Seeburg is a diversified company which, in addition to its vending machine operations, directly or indirectly through its subsidiaries is engaged in the manufacture and sale of coin-operated phonographs, background music systems, hearing aids, electronic organs, coin-operated amusement games, and various musical instruments. Its net sales for the fiscal year ending October 31, 1963, totaled $54,581,306.00. In the same year, the respondent reported sales of coin-operated vending machines comprising 27,115 units in the amount of $22,575,000.00.

Cavalier at the time of the acquisition was engaged solely in the manufacture and sale of bottle and convertible bottle/can vending machines. Its net sales for the last full year, prior to its acquisition by Seeburg were $8,408,823.00.

The vending industry as the examiner found is a large and growing segment of the economy distributing various foods, drinks, cigarettes and related products to the consuming public through coin-operated vending machines placed and serviced in numerous public and private locations by vending operators and soft drink bottlers.

In 1963, the acquisition year, there were approximately 76 companies manufacturing coin-operated vending equipment. These manufacturers in that period reported sales of 606,665 vending machines with a dollar value of 163.5 million dollars. Such equipment has traditionally been purchased by two types of customers, vending operators and soft drink bottling firms.

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[1] Respondent does not manufacture an all purpose food merchandiser.

Vending operators, as the initial decision found, are organizations purchasing and placing banks of vending machines in various locations such as industrial plants, offices and institutions, filling the machines with merchandise and providing the necessary mechanical services for this equipment. The business of certain of these operators is substantial. For example; the Canteen Corporation's sales in 1966, totaled $313,000,000.00, while those of the Servomation Corporation in the same year amounted to $161,000,000.00.

The purchases of vending operators of such equipment are also substantial "For example, in 1966, Servomation Corporation had 92,800 vending machines in operation, up from 71,200 in 1964 . . . Automatic Retailers of America, Inc. had over 97,000 vending machines in operation in 1965 . . . and The Macke Company had over 45,000 machines 'producing revenue daily' in 1966" (I.D. p. 19).

The second significant segment of the market for vending machines is comprised of soft drink bottling firms who bottle and distribute soft drinks made from syrup manufactured by various soft drink manufacturers, such as Coca-Cola, Pepsi-Cola, Royal Crown Cola, Dr. Pepper, etc., who are also referred to in the industry as "parent syrup companies". Most bottling firms are independent franchisees, but parent companies do own a number of bottling plant subsidiaries. Soft drink bottlers purchase vending equipment which they place in various places to dispense soft drinks, and they are the largest single class of customers for bottle and bottle/can vending machines manufactured and sold in the United States. The business of these firms is substantial. For example, the Coca-Cola Bottling Company of Los Angeles reported total sales of $25,000,000.00 in 1965. In the acquisition year, soft drink bottlers made bottle or bottle/can vending machine purchases of approximately $47,000,000.00 from manufacturers whose representatives testified in this proceeding.

The principal question presented on appeal appears to be the proper definition of the relevant market in which to assess the competitive impact of the merger. In this connection, the hearing examiner apparently sustained the allegation in the complaint that all types of vending machines constitute a relevant line of commerce and that bottle vending machines alone constitute an appropriate submarket within the overall vending machine market.[2] As a practical matter, however, the examiner evidently divided the bottle vending machine submarket into two further submarkets, the first, a Coca-Cola bottler submarket, and the

[2] The examiner, however, confused the issue at a subsequent point in the initial decision when he expressed doubt that bottle vending machines constitute an effective area of competition, because bottle vending machines are only one type of coin-operated machine regularly purchased and used by soft drink bottlers to dispense their products to the public. The examiner's doubts on this point also arose from the fact that can and bottle machines in some instances are convertible to either type of soft drink container. It is impossible to reconcile these observations with his previous statement that "Complaint counsel are correct in their assumption that all types of vending machines, as a whole, constitute a relevant line of commerce and that bottle vending machines alone constitute a well-defined submarket within the overall vending machine market" (I.D. pp. 83 and 97, fn. 12). In the Commission's view, the examiner's initial conclusion was correct. Vending machines designed to dispense bottled soft drinks are a well-defined product evidently recognized by the trade as well as by Census classification. They constitute a commercially significant market within which to evaluate the impact of the acquisition. In this connection, it should be noted that Census figures for 1963, show that total sales of bottle vending machines were $52,722,000 while in 1963, total sales for bottle and can vending machines were $55,297,000. Although by 1965, the percentage of the total of can or bottle/can vending machines had increased, bottle vending machines still accounted for the predominant share of this production. Further, as noted below, the competitive picture would not vary significantly whether bottle vending machines alone are taken as a submarket or whether bottle and can vending machines are considered together.

second, a "trade" bottler submarket consisting of the remaining soft drink bottlers such as Pepsi-Cola, Royal Crown, Canada Dry, and Dr. Pepper.[3] Finding, essentially that prior to the merger, Seeburg had confined its operations to "trade" bottlers, while Cavalier had sold exclusively to Coca-Cola bottlers, the examiner concluded because of barriers between these segments of the soft drink bottling industry that "No actual or potential competition existed between Seeburg and Cavalier at the time of the challenged transaction in 1963" (Initial Decision (I.D.) p. 89). The finding that the appropriate geographic market for the purposes of this proceeding is the United States, as a whole, is undisputed.

Complaint counsel on appeal strenuously urge that the challenged acquisition is a conventional horizontal merger of direct competitors which eliminated substantial competition in product markets already characterized by a high degree of concentration. The respondent on the other hand, argues that this case as a matter of law is analogous to the Commission's market and product extension cases, stating in effect that the precedents in this area will not support a finding of violation because the record demonstrates that there was no potential competition between the merged firms.

The threshold question presented therefore on this appeal is the issue of whether Seeburg and Cavalier at the time of the acquisition were actual and, or potential competitors at the time of the acquisition. The resolution of this issue depends largely on the appropriate definition of the bottle vending submarket, which complaint counsel asserts en-

[3] The initial decision states somewhat ambiguously on this point "Whether or not one considers the manufacture and sale of vending machines to dispense bottled Coca-Cola as a submarket separate and apart from the bottle vending machine market, or as a segment of the same submarket, makes little difference economically or legalistically" (I.D. p. 83).

compasses all bottler purchasers of bottle vending machines while respondent argues that the facts of record dictate that it be split into two segments, the Coca-Cola segment and the "trade" bottler segment. We turn first to that issue.

In support of his conclusion that Seeburg and Cavalier were not in actual or potential competition, the examiner laid stress on a number of factors. He found that historically the Coca-Cola segment of the bottling business had developed along different lines from those of the rest of the industry.[4] The examiner also found that the Coca-Cola bottlers numbering more than 1,000 are also deemed the more wealthy and aggressive bottlers. In fact, the Coca-Cola bottlers do constitute an important group of customers, who purchased 53% of the can and bottle vending machines sold to all bottlers in 1963.

The key factor apparently influencing the examiner in his determination that competition did not exist between the acquired and acquiring concern, was apparently the approval programs of the various parent syrup companies with respect to vending machines offered to their bottlers. In this connection, the examiner found that historically suppliers selling to Coca-Cola and "trade" bottlers have submitted their soft drink vending equipment to the parent syrup companies for their approval or acceptance prior to offering such equipment for sale to their wholly owned and franchised bottlers.

According to the examiner, Coca-Cola's equipment approval program appeared to have been the most formal and fully developed at the time of the acquisition. The purpose and objectives of Coca-Cola's program were twofold,

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[4] E.g. "'trade' bottlers, at first did not have the 'orientation towards what we call the' cold bottle market 'that we find in the Coca-Cola industry. Their attitude was just different'" (I.D. p. 21, ¶ 51).

namely, to provide several lines of vending equipment for Coca-Cola, "representative of the high quality characteristic of that product" and secondly, "to assure bottlers of Coca-Cola an advance evaluation of a broad selection of equipment having highest merchandising appeal, designed and built in a manner to operate with maximum efficiency and minimum maintenance and service costs" (RX 289 B, *in camera*).

The examiner further found that Coca-Cola applied its equipment approval program to limit the number of approved suppliers of bottle vending equipment to Coca-Cola bottlers. According to the examiner, under the approval program in effect at the time of and prior to the acquisition, Coca-Cola would work closely with its approved suppliers to modify mechanical and engineering defects found in their equipment to facilitate its approval. In addition, the examiner found that Coca-Cola approval resulted in important advantages for approved suppliers, such as a listing in Coca-Cola's catalog, notification of approval by the parent company to its bottlers, and finally eligibility to participate in promotions such as Coca-Cola's cold drink incentive program designed to increase the number of coolers shipped and placed by bottlers.

The record also demonstrates that other parent companies conducted approval programs similar to those of Coca-Cola, namely, Pepsi-Cola, Royal Crown, Seven-Up, Canada Dry, and Dr. Pepper. These companies too worked with their suppliers to facilitate modifications to remedy defects becoming apparent in the course of testing of vending equipment. As in the case of Coca-Cola, approval by other parent syrup companies gave vending machine suppliers various advantages such as notification that a certain piece of equipment was recommended by the parent company, and the opportunity to participate in a number of promotional programs.

On the basis of his finding that parent company approval is essential to successful sales of bottle vending machines to that firm's bottlers and the further finding that as of the time of the acquisition no vending machine manufacturer "successfully" marketed its upright bottle and can vending machines to both Coca-Cola and "trade" bottlers, the examiner segmentized the bottler market into Coca-Cola and "trade" bottler segments. Respondent unlike the acquired firm, lacked Coca-Cola approval. As a result, as already noted, he concluded that Seeburg and Cavalier did not compete.

As a whole, the record supports the conclusion that parent company approval would be necessary for volume sales to the bottlers affiliated with a particular soft drink syrup manufacturer and the record also supports the finding that in general prior to the time of the acquisition vending machine manufacturers concentrated their sales of bottle vending machines either to Coca-Cola or to "trade" bottlers. This, however, does not justify glossing over other evidence showing the essential unity of the bottle vending machine market or the evidence demonstrating that Seeburg's Choice-Vend Division, although it sold its products largely to "trade" bottlers prior to the challenged acquisition, did actively compete for Coca-Cola business. In the face of this uncontradicted evidence, it was error for the examiner to find no actual or potential competition existed between respondent and Cavalier.

It may be noted at this point, that except for trim and decor there are no basic differences between bottle vending machines sold to Coca-Cola and "trade" bottlers. The physical and engineering characteristics of the equipment sold to Coca-Cola and other bottlers are essentially the same.

Opinion of the Commission

The evidence shows that Seeburg's Choice-Vend Division[5] whose equipment at the time had not been approved by the parent Coca-Cola Company sold bottle and can vending machines to Coca-Cola bottlers as well as to other bottlers in the period 1961 through 1965. Choice-Vend, most of whose bottle vending machine business consisted of selling to the so-called "trade" bottlers, may well have preferred to sell more than it did to Coca-Cola bottlers upon approval by the parent company. The fact remains, nevertheless, that for the period 1961 through 1965, on an overall basis, its sales to Coca-Cola bottlers did increase. Although these sales approximated 3% of the total purchases of such equipment by Coca-Cola bottlers in 1963, transactions in excess of eighty thousand dollars[6] cannot be accurately characterized as negligible as they were by the initial decision. It was error for the hearing examiner to give no effect as a practical matter to evidence of competition where it exists.

As a matter of fact, Seeburg prior to the acquisition made strenuous efforts to secure approval of its machines by the Coca-Cola Company and to sell this equipment to Coca-Cola bottlers. Respondent does not deny that fact, but in effect contends, and the examiner agrees, that because it was unsuccessful in securing approval from the parent company and because its sales to these bottlers were

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[5] Seeburg acquired the Choice-Vend Company, a manufacturer of bottle vending machines, in 1960. After the acquisition challenged in this proceeding, Choice-Vend and Cavalier were operated as separate divisions by the respondent.

[6] RX 417, *in camera*. The fact that these sales were made at conventions and by word of mouth and that Seeburg/Choice-Vend may not have chosen to aggressively solicit these bottlers is immaterial. It does not vitiate the evidence of actual competition furnished by these figures.

not as large as it might like, that it did not compete with Cavalier which had a substantial portion of the Coca-Cola bottler business. The examiner's finding that there was no competition between respondent and the acquired firm will be vacated. Where two firms sell essentially the same product to the same type of customers, even though one of the vendors by virtue of its relationship with a group of customers is more successful with that group than the other, then such suppliers must nevertheless be regarded as competing with each other. Although Coca-Cola in the period preceding the acquisition may have desired to limit the number of its "approved suppliers" this does not detract from our finding on this point. The fact that a supplier may meet a certain amount of sales resistance by some customers or groups of customers has never hitherto been considered as a justification for fragmenting the product market according to the customers sold by different suppliers. As the Supreme Court noted in another context "Unsuccessful bidders are no less competitors than the successful one". It is the purpose of Section 7 to preserve buyers the choice arising out of such competition.[7]

The evidence further indicates that Seeburg/Choice-Vend was able in the period preceding the acquisition to make its sales presentation to Coca-Cola officials and to have its machines tested by the Coca-Cola laboratories for their operational characteristics, such as refrigeration.

The record shows and the examiner so found that on February 5, 1962, Coca-Cola Company advised Seeburg

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[7] *United States* v. *El Paso Gas Co.*, 376 U. S. 651, 661 (1964); see also *United States* v. *Provident National Bank*, 280 F. Supp. 1, 14 (E. D. Pa. 1968), holding "The mere fact that a customer chooses this one bank has nothing to do with competition, since the purpose of Section 7 and the Courts in enforcing this statute, is to preserve competition between the successful and unsuccessful providers of these banking services".

that, although it was confident respondent would make a good supplier, approval had not been granted since Seeburg did not meet Coca-Cola's requirements for approval of new suppliers which were:

> "(a) Make available equipment of same quality as now being purchased by Coca-Cola Bottlers, but at a lower price;
>
> (b) Make available equipment of superior quality but at same price as equipment now being purchased;
>
> (c) Supply needed equipment not now available from present suppliers; or
>
> (d) By some other means save Coca-Cola Bottlers money on their equipment purchases".

Seeburg/Choice-Vend apparently discouraged by this rejection discontinued its approaches to Coca-Cola after 1961. Coca-Cola's requirements for new suppliers, however, do not indicate that Seeburg faced insuperable obstacles in selling to Coca-Cola bottlers or in securing approval from the parent company. It is neither sinister nor unusual for a customer, before taking on a new supplier, to insist that the prospective seller improve upon the performance of existing sources of supply in terms of innovation, lower prices or superior quality. The fact that Seeburg apparently chose not to aggressively compete for this business on the basis of innovation, quality or lower prices, but rather to buy out an existing competitor, does not justify segregating Coca-Cola bottlers from the rest of the bottle vending machine market as the examiner has done here.[8]

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[8] The same conclusion is compelled by the testimony of Cavalier's officials relating to that firm's attempts to sell vending equipment to bottlers other than those affiliated with Coca-Cola in the period 1955-1957. At that time, Cavalier approached a number of parent syrup companies including Pepsi-Cola, Royal Crown Cola, Dr. Pepper, and Seven-Up. Of these companies, Dr. Pepper and

The experience of the Cornelius Company which in the period 1963 through 1965, divided its sales among Coca-Cola and other bottlers in relatively equal amounts (RX 417, *in camera*) evidences that a vending machine manufacturer who developed new products for which bottlers had a need could sell his products both to Coca-Cola and other bottlers without hindrance. This again documents the essential unity of the market for bottle vending machines. Coca-Cola's indication to Cornelius that it did not intend to expand its line of approved equipment involving types of bottle vending machines already in use does not support splitting up the market by customer groups as the hearing examiner and respondent suggest.

Finally, in 1966, Coca-Cola announced a new policy to its bottlers whereunder it advised that vending equipment

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Seven-Up were definitely interested in Cavalier's product and according to Cavalier's officials, helped that firm in every way they could (Tr. 2067-2068). Cavalier's decision to stop soliciting bottlers other than Coca-Cola in 1957, apparently arose primarily from considerations of its own business convenience rather than from economic conditions making such sales impossible. In this connection, Cavalier did not desire to focus its sales efforts on customers on whom it would have to spend considerable time to cultivate their business, at a time when the sales force had already been developed to do a thorough job with Coca-Cola and the effort to serve or solicit new customers would strain its sales force. Further, Cavalier did not desire to expand its manufacturing facilities to permit it to sell or make vending equipment for customers other than Coca-Cola. The import of this testimony is that Cavalier was satisfied with the business it already had with Coca-Cola and did not desire to make the necessary changes or additions to its sales force and manufacturing plant which would enable it to compete successfully for the business of these other customers. Here the record indicates that the decision not to pursue this business arose primarily from Cavalier's own internal conditions rather than the requirements of the market (Tr. 2072-2075). As one of Cavalier's officials conceded in response to the examiner's question, Coca-Cola did not prevent Cavalier from soliciting other bottlers but rather it was a matter of choice on Cavalier's part (Tr. 1970).

would no longer simply be accepted or rejected for approval but that instead the parent company would evaluate such equipment submitted by reputable manufacturers and make such evaluations available to the bottlers. Coca-Cola noted in this connection "Changes always are necessary if we are to improve our competitive position and we trust this program will result in increased sales and profits for us all" (RX 431). This announcement suggesting Coca-Cola was taking steps to broaden the line of vending machine equipment available to its bottlers indicates that there is no economic imperative sundering Coca-Cola bottlers from "trade" bottlers as far as vending machine manufacturers are concerned. There is no indication in the record that market conditions were significantly different in the period preceding the acquisition and up to 1966 from the subsequent period when Coca-Cola decided to encourage greater competition for the business of its bottlers. As far as can be determined from this record, the implementation of Coca-Cola's approval program at the time of the acquisition as well as in 1966, was primarily an internal management matter. The evidence does not indicate that the possibly more restrictive approval program of Coca-Cola in the period preceding and up to the acquisition was dictated by economic imperatives from which the existence of two submarkets for bottle vending machines may be inferred. On the basis of the foregoing, we conclude that bottle vending machines whether sold to Coca-Cola or the so-called "trade" bottlers are an appropriate submarket within which to evaluate the effects of this acquisition. The hearing examiner's contrary finding will be vacated.

We turn to the structure of the vending machine markets wherein the competitive impact of the merger is to be assessed and the position of respondent and Cavalier in that setting. The overall market for all types of vending machines is highly concentrated as demonstrated by the following figures disclosing the market shares of those

manufacturers with over $5,000,000 annual sales in the period 1961-1965:[9]

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[9] Dollar figures rather than unit sales appear to be the more appropriate measure particularly in the case of the overall vending machine market where the diversity of products sold is significantly greater than in the bottle vending machine submarket. Where a variety of products is involved in the market under consideration the realistic measure of market position is sales volume of the reporting firms in terms of price. This is confirmed by a comparison of the sales figures for bottle vending machines where the market share in terms of unit and dollar sales is closely correlated as opposed to the figures for the vending equipment market generally where the disparity of market share figures based on unit and dollar sales is considerably greater.

MANUFACTURERS WITH OVER $5,000,000 ANNUAL SALES OF COIN-OPERATED VENDING MACHINES IN THE UNITED STATES 1961-1965
DOLLAR SALES AND PERCENT OF BUREAU OF THE CENSUS TOTAL

1961			1962			1963			1964		
Company	Sales [1] (Dollars)	Percent of Total [2]	Company	Sales [1] (Dollars)	Percent of Total [2]	Company	Sales [1] (Dollars)	Percent of Total [2]	Company		Sales [1] (Dollars)
The Vendo Co.	$ 44,079,101	25.8%	The Vendo Co.	$ 44,712,355	25.9%	The Vendo Co.	$ 39,547,470	24.2%	The Vendo Co.		$ 47,669,338
Canteen Corp.	21,347,859	12.5	Canteen Corp.	25,232,881	14.6	The Seeburg Corp. [3]	22,572,000	13.8	The Seeburg Corp.		34,237,000
									Cavalier Div. [3]	$ 9,370,844	
									Other	24,866,156	
Universal Match Corp. [4]	18,467,216	10.8	The Seeburg Corp.	21,751,000	12.6	Canteen Corp.	20,095,378	12.3			
			Universal Match Corp. [4]	19,434,444	11.3	Universal Match Corp. [4]	18,518,565	11.3	Universal Match Corp. [4]		23,759,764
The Seeburg Corp.	9,828,000	5.7				Westinghouse Electric Corp.	8,999,000	5.5	Canteen Corp.		17,291,343
Cavalier Corp.	6,652,000	3.9	Cavalier Corp.	6,364,000	3.7	Cavalier Corp.	8,269,000	5.1	Westinghouse Electric Corp.		12,487,000
			Westinghouse Electric Corp.	5,937,000	3.4						
Census Totals [5]	$171,167,000 [6]			$172,335,000 [7]			$163,521,000 [8]				$183,679,000 [9]

EXPLANATION:

[1] Net sales of coin-operated vending machines in the United States. Source—CX 247.

[2] Relationship of net sales of coin-operated vending machines in the United States to the dollar value of shipments (including export shipments) reported by the Bureau of the Census.

[3] Cavalier Corporation was acquired by The Seeburg Corporation December 3, 1963.

[4] Universal Match Corporation changed its name to UMC Industries, Inc., in 1966.

[5] Dollar value of manufacturers' shipments (including export shipments) as reported to the Bureau of the Census, Current Industrial Reports, Vending Machines, Series M35U.

[6] CX 96.

[7] CX 98.

[8] CX 100.

[9] CX 244.

Commission's Exhibit 228

MANUFACTURERS WITH OVER $5,000,000 ANNUAL SALES OF COIN-OPERATED VENDING MACHINES IN THE UNITED STATES 1961-1965
DOLLAR SALES AND PERCENT OF BUREAU OF THE CENSUS TOTAL

1962			1963			1964			1965		
Company	Sales[1] (Dollars)	Percent of Total[2]	Company	Sales[1] (Dollars)	Percent of Total[2]	Company	Sales[1] (Dollars)	Percent of Total[2]	Company	Sales[1] (Dollars)	Percent of Total[2]
Vendo Co.	$ 44,712,355	25.9%	The Vendo Co.	$ 39,547,470	24.2%	The Vendo Co.	$ 47,669,338	26.0%	The Vendo Co.	$ 57,019,329	28.5%
teen Corp.	25,232,881	14.6	The Seeburg Corp.	22,572,000	13.8	The Seeburg Corp.	34,237,000	18.6	The Seeburg Corp.	31,507,000	15.7
						Cavalier Div.[3] $ 9,370,844			Cavalier Div.[3] $ 9,248,118		
						Other 24,866,156			Other 22,258,882		
Seeburg Corp.	21,751,000	12.6	Canteen Corp.	20,095,378	12.3						
ersal Match Corp.[4]	19,434,444	11.3	Universal Match Corp.[4]	18,518,565	11.3	Universal Match Corp.[4]	23,759,764	12.9	Universal Match Corp.[4]	27,044,272	13.5
			Westinghouse Electric Corp.	8,999,000	5.5	Canteen Corp.	17,291,343	9.4	Canteen Corp.	18,360,857	9.2
alier Corp.	6,364,000	3.7	Cavalier Corp.	8,269,000	5.1	Westinghouse Electric Corp.	12,487,000	6.8	Westinghouse Electric Corp.	13,658,000	6.8
tinghouse Electric Corp.	5,937,000	3.4									
	$172,335,000[5]			$163,521,000[5]			$183,679,000[5]			$200,313,000[5]	

[1] dollar value of shipments (including export shipments) reported by the Bureau of the Census.

[2] the Bureau of the Census, Current Industrial Reports, Vending Machines, Series M35U.

The record shows, therefore, that the five leading companies accounted for the following shares of total dollar shipments reported by the Bureau of the Census:

1961	1962[10]	1963[11]	1964	1965
58.7%	68.1%	67.1%	73.7%	73.7%

The record further demonstrates that the acquisition combined the second ranking company, Seeburg, with 13.8% of the market with Cavalier the sixth ranking firm whose market share in the acquisition year was 5.1%, the combined firms accounting for a market share of 18.9%. Furthermore, in the acquisition year, after the 67.1% market share of the five largest companies is accounted for, the balance of the sales in the industry was fragmented among some 71 companies.

The extent of concentration in the submarket for bottle vending machines is even more significant than in the overall vending machine market. This is evidenced by the sales data for manufacturers with over $500,000 of annual sales of coin-operated bottle vending machines in the period 1961-65. The market share totals for bottle vending machines of the five top ranking companies are the following:

1961	1962	1963	1964	1965
80.3%	82.7%	78.3%	84.0%	84.4%

(CX 247, *in camera*; CXs 96, 98, 100, 244.)

In the bottle vending submarket the acquisition combined third ranking Cavalier with 15.6% of the market

[10] In 1962, the record shows there were six companies with shipments of vending equipment of over $5,000,000. The share of these companies of Census totals was 71.5%.

[11] In 1963, there were also six companies with over $5,000,000. Their market share was 72.2%.

with fourth ranking Seeburg which had a market share of 9.4% moving the combined firm to the second spot with a market share approaching 25%.[12]

Another significant characteristic of the vending machine market bearing on the competitive impact of the merger is the fact that this industry has seen a steady decline in the number of manufacturers reporting their sales to the Bureau of the Census, indicating as a result that the number of at least the substantial manufacturers in this industry has sharply declined. In the period 1957-1964, the number of known manufacturers of these products reporting their sales to the Bureau of the Census dropped to 66 from 130 companies. The number of bottle vending machine manufacturers in the same period also decreased sharply, dropping to 10 in 1964, from 15 in 1957 (CX 88, 99). Mergers contributed to this trend.

The overall vending machine market and the bottle vending machine submarket are highly concentrated with their concentration ratios "characteristic of oligopoly."[13] This is significant, for the structure of a market is an important consideration in evaluating the prospective competitive impact of a merger. Judicial and Commission precedent

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[12] The picture as far as the combined sales for can and bottle vending machines are concerned, does not significantly differ from the statistics for bottle vending machines alone. The concentration of market shares among the five largest firms in the case of bottle and can vending machines is the following:

1961	1962	1963	1964	1965
79.3%	82.8%	78.8%	85.3%	88.8%

Moreover, after the merger the respondent became the second ranking manufacturer of such equipment with a market share of approximately 25%.

[13] See *The Procter & Gamble Company*, F.T.C. Docket 6901 (Opinion of the Commission, November 26, 1963), p. 42, rev'd 358 F2d 74 (6th Cir. 1966) rev'd 386 U.S. 568 (1967).

recognize that industry structure will permit reasonable predictions as to the ultimate performance the industry is likely to turn in.[14] As Justice Harlan stated, "If § 7 is to serve the purposes Congress intended for it . . . [o]nly by focusing on market structure can we begin to formulate standards which will allow the responsible agencies to give proper consideration to such mergers and allow businessmen to plan their actions with a fair degree of certainty."[15] The examiner's analysis glossing over the relevant market structure in this proceeding as well as his dismissal of the standards promulgated by the pertinent precedents as "legalistic abstractions" constituted fundamental error. Further the initial decision erred by ignoring the central legislative purpose behind the Celler-Kefauver amendment, namely, the Congressional desire to stem further economic concentration. As the Supreme Court recognized "The dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy."[16]

In this case, as already noted, the relevant pre-merger markets by virtue of the concentration of substantial sales among a few manufacturers may be characterized as oligopolistic. In this connection, the Supreme Court held "That '[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share,' is common ground among most economists, and was undoubtedly a premise of congressional

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[14] *United States* v. *Provident National Bank*, *supra* note 7.

[15] *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 592 (1967) Concurring opinion of Mr. Justice Harlan.

[16] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315 (1962); *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

reasoning about the antimerger statute."[17] Of oligopoly the Court has stated "As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition will emerge."[18] In this case the degree of concentration in both the pre and post acquisition markets are characterized by levels of concentration recognized by the Commission, courts, and commentators as making likely the emergence of "policies of mutual advantage."[19] Clearly, we are confronted here with "the kind of further concentration in an oligopoly framework that Congress was concerned with" for "'Tend to create'

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[17] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

[18] *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280 (1964). On this point see also the holding of the Commission in *Beatrice Foods Company*, F.T.C. Docket 6653 (Opinion April 26, 1965), pp. 27-28: "'. . . In markets where one or a very few firms control a large part of the total sales, there is a tendency for all firms to refrain from vigorous price competition. Each large seller knows that if he makes an across-the-board price cut, the inroads on his major competitors' market shares will be so palpable that they will be compelled immediately to make a corresponding price cut—and that consequently there is little advantage to be gained from price cutting. The small firms in such a market are also inhibited from initiating price competition. They know that the majors will react promptly, perhaps with drastic effect, to any attempt to disturb the price structure.'"

[19] *United States* v. *Aluminum Co. of America*, *supra* note 18; these markets would be characterized by Professors Kaysen and Turner as a "'Type One structural oligopoly', wherein 'the first eight firms have at least 50 percent of total market sales and the first twenty firms have at least 75 percent of total market sales.'" *The Procter & Gamble Co.*, *supra* note 13 at 42 n. 40. According to Professors Kaysen and Turner "In Type One oligopoly, recognition of interdependence by the leading firms is extremely likely'. . . [and it is unlikely] that the response of the small sellers will . . . limit the behavior of the larger firms." Kaysen and Turner, *Antitrust Policy* 27 (1959).

a monopoly' clearly includes aggravation of an existing oligopoly situation."[20]

The market share statistics in this case bring the proceeding within the rule that "if concentration is already great, the importance of preventing even slight increases of concentration and so preserving the possibility of eventual deconcentration is correspondingly great."[21] Moreover, the post acquisition market share of the respondent in the submarket is close to 25% and accordingly "approaches that held presumptively bad in *United States* v. *Philadelphia National Bank*."[22] Furthermore, in view of the trend toward concentration evident in both markets, this case falls "within the principle that where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their incipiency.'"[23] Finally, the acquisition violates Section 7 because it eliminates significant competition between major competitive factors in the relevant markets.[24] Such mergers constitute a violation of the Sherman Act and therefore *a fortiori* of Section 7 of the Clayton Act,

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[20] *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D. N.Y., 1958).

[21] *United States* v. *Philadelphia National Bank*, *supra* note 17 at 365 n. 42.

[22] *United States* v. *Continental Can Co.*, 378 U.S. 441, 461 (1964).

[23] *Ibid.*

[24] In this proceeding, 72.2% of sales in the acquisition year were concentrated among the top ranking six companies in one market (the overall vending machine market) and 78.3% of sales were concentrated among the leading five firms in the submarket (bottle vending machines). Since both firms involved in the acquisition are in the one case in the top six and in the other in the top five, they must of necessity be considered major competitive factors.

"without reference to the strength or weakness of whatever competition remain[s]".[25]

The examiner, in addition to finding that the merger could not have the requisite anticompetitive effect because Seeburg and Cavalier were not actual or potential competitors, also concluded that the merger was positively beneficial. That conclusion rests apparently on his finding that the acquisition was a diversification move which increased competition between the combined firms and Vendo, which he termed as the dominant firm in the industry.

The contention of the examiner that Seeburg's acquisition of Cavalier amounted simply to a diversification of Seeburg's business by enabling respondent to compete for the business of the Coca-Cola bottlers is rejected since, as heretofore noted Seeburg and Cavalier were actual competitors selling essentially the same products to the same general category of customers. In that context, the description of the challenged acquisition as a diversification move is at best a euphemism for the elimination of competition.

The real issue raised by respondent and the examiner is not whether the merger is harmless because it is simply a move for diversification, but, rather, whether the anticompetitive effect resulting from the elimination of competition between Seeburg and Cavalier is outweighed by the prospect that the combined firms could compete more effectively with Vendo, the leading firm in both the overall vending machine market and the bottle vending machine submarket.

Essentially, respondent and the hearing examiner contend that the vending machine industry is changing because of a trend to full line vending in which Coca-Cola bottlers play an important part. A part of or allied to this trend

[25] *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665, 670 (1964). *Fruehauf Trailer Company*, F.T.C. Docket No. 6608 (Commission Opinion, May 28, 1965) p. 6.

to full line vending are the National Users' plans[26] in which, again, Coca-Cola plays an important part. The gist of the examiner's findings on this point is evidently that Cavalier is strong where Seeburg is weak and that Seeburg's strengths complement the weaknesses of Cavalier. Specifically, the examiner found that the acquisition strengthened Seeburg by giving it an assured entreé to Coca-Cola bottlers by virtue of the parent company's approval of Cavalier. On the other hand, the examiner found that Cavalier as a single line company specializing in bottle and can vending machines faced an uncertain future in the vending machine industry in view of the fact that full line vending is becoming more significant. He found, therefore, that Cavalier, by securing access through the merger to other types of vending machines to round out its line, was able to participate in the trend toward full line vending in the industry. The fact that the merger may have benefited both Seeburg and Cavalier in that it put the combined firms in a stronger position vis-a-vis Vendo does not, however, vitiate the anticompetitive effect flowing from the elimination of a major competitor in highly concentrated markets.

As already noted, the acquisition as far as Seeburg is concerned cannot be considered a diversification move since it was acquiring a competitor selling essentially the same product. Further, Seeburg, prior to the merger, already had a fairly complete line of vending machine equipment. As far as Seeburg is concerned, this merger did not broaden the line of vending equipment products available to it. Clearly, prior to the merger Seeburg already had a line of equipment enabling it to participate in full line vend-

[26] In the case of the National Users' programs, national companies such as oil companies purchase uniform banks of vending equipment direct from the manufacturer for placement in their filling stations or other locations. Color schemes are customized to the National Users' specifications.

ing. Moreover, while Coca-Cola bottlers may be a significant factor in the full line vending picture, as the hearing examiner found, the fact remains that the vending operators, as distinguished from bottlers, have traditionally engaged in full line vending and there is no indication in this record that Seeburg faced any disadvantage in selling to this class of customers vis-a-vis Vendo or any other competitor. Further, the hearing examiner's findings gloss over the fact that bottlers of soft drinks other than Coca-Cola have branched into full line vending.[27] As far as Seeburg is concerned, it is clear that the short-run benefits accruing to Seeburg as a result of the acquisition do not outweigh the long-range anticompetitive effect resulting from the elimination of Cavalier as an active participant in the vending machine market.

In the case of Cavalier, while access to a fuller line of vending machines would be to that firm's advantage, it does not appear that this lack prevented the acquired concern from maintaining a substantial position in the market, and certainly its profit picture towards the end of 1963 was a healthy one. At the time of the acquisition, when the trend toward full line vending upon which the examiner and respondent rely had already become evident, Cavalier

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[27] According to William F. Swingler, Vice President of the Canteen Corporation,

> "Well, Pepsi Cola bottlers, many of them are in full line vending. I believe Nehi in many places. Many of the bottlers have branched off into general vending. Any of the national companies." (Tr. 1640).

This is corroborated by the testimony of Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, who, although stressing the significance of the Coca-Cola segment in full line vending (Tr. 2114), did concede that "trade" bottlers who engaged in full line vending in 1963 were also on the increase (Tr. 2115). Similarly, the record indicates that Pepsi-Cola as well as Coca-Cola figures in the National Users' programs (RX 399, *in camera*).

was obviously a viable competitor. This record does not compel the conclusion that the merger was vital to Cavalier's survival as a significant participant in the vending machine market. Certainly, the experience of the Cornelius Company whose only coin-operated vending machines in the period 1961-65, were two basic models of a horizontal bottle vendor (Tr. 1768) demonstrates that a single line company sufficiently innovative to develop a product for which the industry feels a need, can be an effective and growing competitor. Nor does the evidence show that Cavalier's merger with the second ranking company in the 1963 overall vending machine market was necessarily the only avenue towards participation in full line vending. For example, the Westinghouse Corporation, when it did not have a full line of vending equipment, designed certain of its machines so that their appearance would be compatible with that of Vendo (Tr. 1722).

Moreover, permitting this merger on the ground that it permits increased competition with Vendo, the leading firm in the market, might well set off a wave of mergers in an industry already highly concentrated. "[T]he remaining large producers . . . could with equal logic urge that they, too, be permitted to join forces and to concentrate their economic resources in order to give more effective competition to the enhanced 'Big 2'; and so we reach a point of more intense concentration in an industry already highly concentrated—indeed we head in the direction of tri-opoly."[28] The argument must be rejected because to accede to it would "endanger a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages sought by [the acquiring firm] in this case."[29]

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[28] *United States* v. *Bethlehem Steel Corporation*, *supra* note 20 at 618.

[29] *United States* v. *Continental Can Co.*, *supra* note 22 at 464.

The examiner, in finding that the merger did not have the requisite competitive effect, also laid considerable stress on the fact that the market share of the combined firms declined in the period 1963 through 1965.[30] His stress on this evidence is misplaced. Although post acquisition evidence may be considered, it should not be given conclusive weight or allowed to override all probabilities evident at the time of the merger since "the force of § 7 is still in probabilities, and not in what later transpired."[31] Although the combined firms by 1965 experienced a slight decline in the share of the market enjoyed by them, this must be evaluated in the context of the continued substantial increase in concentration among the five largest firms in both markets. Moreover, respondent's decrease of course did not restore rivalry between Seeburg and Cavalier. It is not relevant therefore to the question of the merger's probable competitive effect, for even a decline in concentration after an acquisition involving a substantial competitor does not dispel the presumption that competition would have benefited had that firm remained independent.[32]

The final issue presented on appeal is the question of the appropriate remedy. Complaint counsel argue strenuously that only divestiture will adequately restore competition while respondent contends that severing Seeburg and Cavalier would benefit only Vendo, the leading vending machine manufacturer, to the detriment of competition. Although we do not reach a final decision on this issue at

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[30] In 1963, Seeburg and Cavalier accounted for 18.9% of the overall vending machine market, and their share declined in 1965, to 15.5%. The corresponding figures for the bottle vending machine submarket are 25% and 23.7%, respectively.

[31] See *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965).

[32] See *Crown Zellerbach Corporation* v. *Federal Trade Commission*, 296 F2d 800 (9th Cir. 1961), cert. denied 370 U.S. 937 (1962).

this time, complaint counsel's argument appears to have considerable merit. Both the overall market for vending machines and the bottle vending machine submarket are characterized by a high degree of concentration in a setting where the trend towards concentration has been evident for some time.

We agree that in view of the respondent's tendency to expand by acquisition, coupled with the high degree of concentration in the market, that Seeburg should be prohibited from acquiring vending equipment suppliers for a period of ten years unless such mergers are approved by the Commission. Under the circumstances of this case, preventive relief in addition to other relief is essential to effectively carry out the Congressional policy expressed in Section 7 of the Clayton Act.[33]

We turn now to respondent's argument that divestiture of Cavalier would eliminate "the 'real competition' which Vendo feels today from Seeburg Cavalier".[34] On the present record this argument is unpersuasive. Respondent itself asserts that Coca-Cola's 1966 revision of its approval policy for bottle and can vending equipment opened that segment of the bottler market to competition by all vending equipment suppliers.[35] Although respondent made this argument in another context, this makes it clear on respondent's own admission that even without Cavalier Seeburg should be able to compete aggressively like any other vending equipment supplier for the Coca-Cola business[36] and to offer Vendo effective competition for the

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[33] See *Beatrice Foods Company*, F.T.C. Docket No. 6673, Opinion Accompanying Final Order, December 10, 1965, p. 5.

[34] Respondent's Answering Brief, p. 53.

[35] Respondent's Answering Brief, p. 32.

[36] In fact, certain of Seeburg's Choice-Vend equipment was approved by Coca-Cola in 1966 (Tr. 2000-1).

Coca-Cola business, as well as that of other soft drink bottlers.

In the case of the acquired firm, respondent argues, in effect, that Cavalier on its own would not be a viable competitor. Without access to Seeburg's full line of vending equipment, respondent contends it would be difficult for Cavalier to adequately serve Coca-Cola bottlers or to penetrate the National Users' market. For the reasons already stated, we are not persuaded that the merger with Seeburg was requisite to Cavalier's continuation as a successful competitor. However, as a result of the acquisition, Cavalier may have become dependent on access to Seeburg's vending equipment, other than can and bottle vending machines. Certainly, since the merger has been in effect, Cavalier has been unable to turn to alternative sources of full line vending equipment. On the basis of respondent's representation that Cavalier requires continued access to a full line of vending equipment to assure its viability, the Commission has determined that consideration should be given to a provision requiring Seeburg to make available for a number of years to the divested firm, a full line of vending equipment excluding can and bottle vending machines. However, the Commission needs more information to permit it to draft an appropriate order. Accordingly, we direct the parties to submit proposed forms of order with supporting briefs presenting relevant views, data and argument within thirty days of the receipt of this opinion and order. When this information is before it, the Commission will issue its final order.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

July 15, 1968

Final Commission Order

APPENDIX E

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 8682

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

In the Matter of

THE SEEBURG CORPORATION,
a corporation.

Final Order

Pursuant to the Commission's order of July 15, 1968, complaint counsel and respondent have submitted proposed forms of order and supporting memoranda. The Commission has considered these proposals and has concluded, for the reasons stated in the accompanying opinion, that the following order is appropriate in light of the Commission's decision in this matter and the public interest, and that it should be adopted and issued forthwith as the Commission's final order. The Commission has also determined for the reasons stated that respondent's motion to withdraw this matter from adjudication should be denied. Accordingly,

A

IT IS ORDERED that respondent, The Seeburg Corporation, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and

assigns, within one (1) year from the date of service of this order, shall divest absolutely and in good faith, all stock, assets, properties, rights and privileges, tangible or intangible, including but not limited to all properties, plants, machinery, equipment, trade names, contract rights, patents, trademarks, and good will acquired by The Seeburg Corporation as a result of the acquisition by The Seeburg Corporation of the assets of Cavalier Corporation, together with all plants, machinery, buildings, land, improvements, equipment and other property of whatever description that has been added to or placed on the premises of the former Cavalier Corporation, so as to restore Cavalier Corporation as a going concern and effective competitor in the manufacture and sale of bottle vending machines.

B

It Is Further Ordered that pending divestiture, respondent shall not make any changes in any of the plants, machinery, buildings, equipment or other property of whatever description of the former Cavalier Corporation which shall impair its present capacity for the production, sale and distribution of vending machines, or its market value.

C

It Is Further Ordered that by such divestiture, none of the assets, properties, rights or privileges, described in paragraph A, of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, The Seeburg Corporation or any subsidiary or affiliated corporations of The Seeburg Corporation, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of The Seeburg Corporation, or to any purchaser who is not approved in advance by the Federal Trade Commission.

D

IT IS FURTHER ORDERED that respondent shall for a period of ten (10) years from the date of service of this order, cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, all or any part of the share capital or other assets of any corporation engaged in the manufacture and/or sale of vending machines in the United States.

E

IT IS FURTHER ORDERED that respondent shall submit to the Commission periodically, within thirty (30) days from the date of service of this order and every ninety (90) days thereafter, a report in writing setting forth its efforts and progress in carrying out the divestiture requirements of this order until all such assets have been divested with the approval of the Commission; and respondent shall submit to the Commission on the first day of each calendar year a report in writing setting forth its compliance with the cease and desist provisions of this order.

F

IT IS FURTHER ORDERED that respondent notify the Commission of the names and addresses of all persons, firms or corporations who shall express to respondent any interest in purchasing the assets to be divested under the terms of this order, within thirty (30) days after having been informed of such interest.

G

IT IS FURTHER ORDERED that respondent's motion to withdraw this matter from adjudication be, and it hereby is, denied.

Final Commission Order

By the Commission

Commissioners Dixon and Elman believe that, in view of the changed conditions now existing in the vending machine industry, the public interest would be served by disposing of the case on the basis of the consent order settlement submitted by respondent.

JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

[SEAL]

ISSUED: April 10, 1969

ATTACHED ARE: (1) Opinion of the Commission, and

(2) Concurring Statement of Commissioner Jones.

APPENDIX F

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 8682

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

In the Matter of
THE SEEBURG CORPORATION,
a corporation.

Opinion of the Commission

The Commission on July 15, 1968, issued its opinion and order finding that Seeburg's acquisition of the Cavalier Corporation in 1963, violated Section 7 of the Clayton Act, as amended. At that time the Commission deferred the entry of a final order to permit respondent and complaint counsel to file proposed forms of order and briefs in support thereof since additional information might assist the Commission in framing an appropriate remedy.

Both complaint counsel and respondent have filed their proposals for the final order with supporting memoranda. Respondent, in conjunction with its proposed order and supporting memorandum, also filed a motion requesting withdrawal of the proceeding from adjudication for the purpose of permitting settlement by entry of a consent order. Although denying respondent's motion for withdrawal from adjudication, the Commission did by order of November 26, 1968, afford the parties the opportunity

to present oral argument, which was held on December 9, 1968. Prior to oral argument respondent also submitted a number of affidavits containing confidential business and financial data which were put *in camera* at respondent's request.

In view of respondent's request for *in camera* treatment of the financial and business data relied upon to support its motion to withdraw, this opinion will not discuss that information in detail but focus primarily on the broad issues raised by respondent on the public record. The Commission nevertheless has taken these affidavits into consideration in reaching its decision. Although preserving the *in camera* status of such information in the preparation of this decision, the Commission reserves the right to utilize it on the public record should this become necessary during the course of judicial or administrative proceedings subsequent to the entry of this order.

It is evident that the position of the parties has not changed since the Commission first considered this matter on the appeal from the hearing examiner's initial decision. Complaint counsel still insists that only divestiture will compensate for the disappearance of Cavalier as an independent competitor. Respondent, on the other hand, continues to argue that requiring divestiture in this instance would harm rather than promote competition. It may be noted in this connection that the Commission solicited the views of complaint counsel and respondent on whether consideration should be given to requiring Seeburg to make available to Cavalier a full line of vending equipment excluding can and bottle vending machines to cushion the impact of divestiture on the acquired firm. Both parties adhering to their original views on the divestiture issue have failed to make recommendations designed to implement this suggestion.

We first turn to respondent's contentions set forth in its motion to withdraw this matter from adjudication filed

September 25, 1968.[1] Essentially respondent makes three arguments: First that divestiture is either inappropriate or unnecessary because natural forces have increased competition in the market. Second, that divestiture may lessen competition "by setting Cavalier adrift as a less than viable competitor". And third, that divestiture might result in "punitive financial loss to Seeburg which could impair its ability to remain an effective competitor of dominant Vendo". As an alternative to divestiture, respondent proposes an order which would ban Seeburg for ten years from acquiring firms engaged in the manufacture or sale of coin-operated packaged soft drink vending equipment without obtaining prior Commission approval. In addition, respondent's proposed order would require Seeburg to license on a non-exclusive non-discriminatory basis, all vending machine patents owned by its Cavalier Division.

Certain of respondent's contentions, we have previously considered. The contention that natural forces have increased and are continuing to increase competition seems in large part to be a repetition of the argument in opposition to complaint counsel's appeal that Coca-Cola's changed policies making its bottlers accessible to more manufacturers enhanced competition. While there may be additional competition for the business of Coca-Cola bottlers, this is largely irrelevant to the question of restoring competition in the overall vending machine market and the bottle vending machine submarket. Whatever the facts may be as to one group of customers, it is clear that competition in both markets diminished because of Cavalier's disappearance as a major independent competitive entity. Moreover, we cannot agree with respondent's view that the merger between the Selectivend Corporation and the Cor-

[1] Although the Commission's Order and Opinion of July 15, 1968, did not authorize such a motion, the respondent's supporting memorandum will be treated as if it were a brief in support of its proposed order which was filed on October 1, 1968.

nelius Company as well as other mergers in the bottle and can equipment vending field is evidence of increased competition justifying the continued combination of Cavalier and Seeburg. We draw the opposite conclusion.

Respondent's second argument for a remedy falling short of divestiture is the contention that Cavalier if divorced from respondent would not be a viable competitor. Seeburg contends Cavalier as a single line company selling solely to Coca-Cola bottlers had an uncertain future since it faces increased competition in selling to these customers because of the changes in Coca-Cola's approval policies. In addition, respondent asserts the combined firms' profits are falling at this time. However, whatever its present tribulations, Cavalier is by no means a failing company. Respondent further suggests that Cavalier would not be successful in selling to non-Coca-Cola bottlers since its ability to secure satisfactory sources of full-line vending equipment if divorced from Seeburg is "questionable".

This argument is rejected. Seeburg's Choice-Vend Division is now competing for both the non-Coca-Cola and Coca-Cola bottler trade. Choice-Vend's increasing sales to Coca-Cola bottlers are by no means insubstantial. Its success may well account for certain of the competitive inroads on the acquired firm's business which Seeburg asserts militate against the divestiture of Cavalier. After the change in Coca-Cola's policy, respondent evidently was careful to carve out a share of this customer group for Choice-Vend. Coca-Cola's policy change, which Seeburg asserts threatens Cavalier's continued viability, should also have indicated to prudent management the need for a diversified sales effort to expand the acquired firm's market beyond its existing customers, the Coca-Cola bottlers. Despite the claim that Cavalier needs Seeburg's continued financing and capital support,[2] it appears that such re-

[2] Oral Argument Tr. 11.

sources were not applied to make changes in order to facilitate a wider marketing effort on the part of the acquired firm. Seeburg does not explain its reasons for withholding the investment for a more diversified sales effort by Cavalier. In the light of the claim that the change in Coca-Cola's approval procedures threatened Cavalier's position, respondent's failure to support such a broadened sales effort for the acquired firm, in contrast to its Choice-Vend policy, is inexplicable. Whatever the consequences of such a management failure it cannot be set up as a defense against divestiture if the public interest requires that remedy.

On the question of whether Cavalier, after divestiture would be able to secure alternative sources of full-line vending equipment complementary to its bottle and can vending machines, respondent merely contends that its ability to do so would be "questionable". Respondent does not directly challenge complaint counsel's assertions that such equipment is available on the open market. On this record, there is no reason for concluding that Cavalier would be unable to secure full-line vending equipment if this is needed to supplement its own machines, although it might be more difficult without the ties now binding it to respondent. In addition, it appears, as complaint counsel has stated, that a number of single line companies have managed to compete successfully and effectively in the relevant markets.

Respondent also argues that, in view of Cavalier's dependence on the Coca-Cola market and the increased competition of sales to these bottlers, divestiture of Cavalier would result in a substantial loss to Seeburg. Even on the basis of respondent's *in camera* affidavits the amount of the loss, if any, to Seeburg resulting from a divestiture of Cavalier is conjectural. Moreover, even if respondent were to incur such loss, the Commission may not withhold

divestiture for that reason, since the circumstances of the case require the restoration of the acquired firm as an independent competitor. "Economic hardship can influence choice [of alternatives] only as among two or more effective remedies."[3]

Respondent stressing Cavalier's diminished market position and profit picture since 1966, contends divestiture should not be required since no suitable purchasers are available. Although Seeburg ostensibly appeals to the Commission's sense of equity rather than to the failing company doctrine,[4] judicial precedent on that defense is relevant. No efforts to date have been made by respondent to locate a suitable purchaser for the acquired firm. Cavalier's business is still substantial and it is still making a profit. The factual foundation for respondent's contention that divestiture would be unworkable is at best inconclusive. Only recently, the Supreme Court held in effect that where no positive effort has been made to find a non-competing purchaser as an alternative to an illegal merger, then the failing company doctrine does not apply:

> "The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires it or brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power . . ."[5]

A fortiori the requirement that affirmative measures be taken to seek a satisfactory purchaser necessarily applies

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[3] *United States* v. *du Pont & Co.*, 366 U.S. 316, 327 (1961).

[4] Oral Argument Tr. 50.

[5] *Citizen Publishing Company et al.* v. *United States*, 37 U.S.L. Week 4208, 4210 (1969).

in a case where the respondent seeks to escape divestiture not in reliance on that doctrine but rather on an appeal to the Commission's sense of equity.[6]

"The most appropriate remedy to redress a Section 7 violation is generally divestiture . . . [and it] commends itself as a rational course in restoring competition to the condition which obtained prior to the merger."[7] As the

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[6] Compare also, *United States* v. *Pabst Brewing Co.*, 5 Trade Reg. Rep. ¶ 72,723 (E.D. Wis. 1969) holding:

"Pabst had the burden of proving that it had made every reasonable effort to explore alternative management and merger possibilities, either as a prospectively acquiring firm or as a firm to be acquired. Pabst has demonstrated that it undertook some limited contacts with a number of firms, but the proof in this respect falls short of a sufficiently clear showing that Pabst management undertook a well-conceived and thorough canvass of the industry such as to ferret out viable alternative partners for merger. Thus, Pabst did not show that the capital transfer resulting in its Blatz acquisition was the only available and reasonable one."

* * * *

"In view of this test the defendants must establish two material elements to their defense: that at the time of the merger, the firm was indeed 'failing' in the sense that the firm was heading inevitably in the direction of bankruptcy, with the grave probability that failure would ensue—that is, that the trend was irreversible; and that in respect of the merger, there were available no reasonable, possible, or feasible alternatives which would have permitted the acquiring firm to remain an independent, competitive factor within the brewing industry."

"On the basis of the record in this case it appears that the defendants were in a very serious, even precarious, financial position at the time of the merger. Nonetheless, they have failed to satisfy their burden of proving the material elements of the failing firm defense. This defense, on the facts in this case, is hereby rejected."

[7] *Diamond Alkali Company*, F.T.C. Docket 8572, Final Order and Opinion, October 2, 1967, p. 4.

Supreme Court noted, "[i]t is, simple, relatively easy to administer, and sure. It should always be in the forefront of a Court's mind when a violation of § 7 has been found."[8]

"The key to the whole question of antitrust remedy is of course the discovery of measures effective to restore competition."[9] Judged by that criteria, respondent's proposed order must be rejected. The Commission found the Cavalier-Seeburg merger violative of the Merger Act because it eliminated a major competitor in highly concentrated markets which for some time had been characterized by a pronounced trend toward concentration. A ban on future acquisitions, which is necessary as a prophylactic measure to check further centralization in both relevant markets, will not restore the merged firm as an independent competitive entity. Furthermore, there is no indication in this record that Cavalier's patents represent breakthroughs of such a nature that opening them up to licensing would stimulate competition in any meaningful way. As respondent's counsel noted in oral argument before the Commission, "the big attraction of Cavalier . . . wasn't its technical innovation as a junior IBM of the vending

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[8] *United States* v. *du Pont & Co.*, *supra* at 331. Respondent's reliance on *National Tea Co.*, F.T.C. Docket No. 7453 (Commission Order and Opinion, March 4, 1966) to support the contention that a lesser remedy than divestiture will suffice is misplaced here. The decision in *National Tea* to confine the order to a ban on future acquisitions rested on a record involving largely market extension as opposed to horizontal mergers. Further the Commission in that case specifically found that relative ease of entry could in time dissipate the restraints on competition resulting from the challenged acquisitions, a finding we are unable to make on this record. Moreover, in any event, it is most unlikely that new entrants could dispel the anticompetitive effects flowing from a merger between direct major competitors in markets which are already highly concentrated.

[9] *United States* v. *du Pont & Co.*, *supra* at 326.

machine industry."[10] In sum, Seeburg's proposal must be rejected because it will not effectively remedy the violation of the merger statute demonstrated by this record.[11]

The Commission accordingly will adopt the proposed order recommended by complaint counsel which provides for divestiture of the acquired firm and a ban for ten years on acquisitions without prior Commission approval of corporations engaged in the manufacture and/or sale of vending machines in the United States.

Commissioners Dixon and Elman believe that, in view of the changed conditions now existing in the vending machine industry, the public interest would be served by disposing of the case on the basis of the consent order settlement submitted by respondent. Commissioner Jones has filed a concurring statement.

April 10, 1969

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[10] Oral Argument Tr. 18.

[11] The disposition in *The Vendo Co.*, 54 F.T.C. 253, 256 (1957), is not controlling here. In that case, the Commission adopted the hearing examiner's finding that the acquired firm, Vendorlator, "probably had infringed upon the basic patent of respondent [Vendo] for a period of about two years, and at the time of the acquistion, more than eighty percent of the production of the Vendorlator Manufacturing Company was of such machines." That finding it appears was critical in the choice of remedy. The facts in *Vendo* are unique and indicate on their face why the Commission accepted a remedy lesser than divestiture. For obvious reasons the order in that case has no relevance here. As the Supreme Court noted with respect to the precedential force of consent decrees granting relief short of divestiture, "the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." *United States* v. *du Pont & Co.*, *supra* at 330 n.12.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 8682

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
Mary Gardiner Jones
James M. Nicholson

In the Matter of

THE SEEBURG CORPORATION,
a corporation.

Concurring Statement of Commissioner Jones

A majority of the Commission has determined that respondent Seeburg Corporation must divest itself of the Cavalier Corporation which the Commission previously found had been illegally acquired by Seeburg in violation of Section 7. I concur in this action but would like to state more fully my reasons for concluding that divestiture is essential in this case.

I am of the view that respondent's argument respecting Cavalier's present debilitated state is inaccurate and its pessimistic conclusions respecting Cavalier's potential competitive vitality are without any valid support in the record even assuming, which I do not, that such crystal ball gazing should be a relevant factor in the Commission's decision as to whether divestiture is a proper and essential remedy.[1]

[1] The theory of the antitrust laws is that the market should be determinative of competitive vitality and that individual members of that market are not the ones to make that judgment, especially when the judgment is expressed as support for an argument that the company which was illegally acquired should not be divested.

Examination of Cavalier's annual and ten-month income statements obtained from *in camera* submissions by Seeburg and Cavalier, from 1963, the last year of its independent existence, through 1968 demonstrates that Cavalier has *not* declined since 1963. Rather, it shows that in 1968 Cavalier was just as healthy as it was in 1963, when it was acquired by Seeburg, and just as healthy as in its peak income year of 1965, before Coca-Cola opened its custom to a broader line of vending manufacturers.

Seeburg argues that Cavalier's profits since Coca-Cola broadened its purchasing policy (1966 through 1968) have been declining with the result that its 1968 net profits are substantially below those of peak Coca-Cola year 1965. However, a closer examination of Cavalier's income, expense, and profit data casts considerable doubt as to whether the alleged declines in Cavalier's profits since 1965 are as substantial as Seeburg contends, and doubt even as to whether there has been any significant decline at all. The apparent profit low point of 1968 and high level of 1965, the peak year from which profits allegedly tumbled, seem to result from an unexplained underestimation resulting from varying and seemingly arbitrary accounting treatment by Seeburg of Cavalier's expenses in 1965 relative to 1968.

For example, Seeburg made no allocation to Cavalier's net income in 1965 for corporate taxes in that year, although provision for taxes was allocated to Cavalier in each of the years following 1965. If Cavalier as a part of Seeburg in 1965 was made to pay the same approximate average 50 percent tax which Cavalier paid when it was independent (1963) and which it has paid subsequent to 1965, its supposedly peak 1965 ten month profits would have been reduced by almost half the actual amount contended by Cavalier. Even at this profit level, however, Seeburg's figures would indicate that Cavalier has suffered a decline in profits from its peak year of almost 50

percent. However, a closer look at some of the expense items attributed to Cavalier by Seeburg in 1968 suggests that this 50 percent decline in its 1968 profit figures relative to 1965 may be substantially overstated. For example, even though Cavalier's volume of sales was higher in 1965 than 1968, substantial selling expenses are stated in 1968 while none were apparently incurred in supposedly peak 1965; administrative expenses in lower volume 1968 are substantially higher than for 1965; intercompany expenses of Seeburg allocable to Cavalier as one of Seeburg's subsidiaries are 100 percent higher in lower sales year 1968 than in "banner" year 1965.[1] In addition, if the allocation to its subsidiaries of expenses which Seeburg incurs in administering those subsidiaries is eliminated for supposedly anemic 1968, as it would be if Cavalier were independent, its net profits would be larger than they were in the last year of its independence, 1963, when Seeburg admitted Cavalier was a viable competitor.

There is no doubt that after Coca-Cola broadened its list of bottle vending suppliers in 1966, Cavalier suffered a sales decline. However, this decline in sales roughly parallels an overall decline in sales in the entire vending machine industry, so that one certainly cannot say that Cavalier's sales performance has been any different from that of its competitors.

Thus not only is Cavalier's profit picture less precarious that it is pictured by Seeburg, but in addition the loss of its Coca-Cola business does not seem to be nearly as damag-

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[1] Likewise, some crucial expenses in 1966, another profitable year though not as profitable as 1965, appear understated relative to 1968, with resultant over-estimation of 1966 profit and underestimation in 1968. For instance, cost of sales is higher in 1968 though sales were down from 1966 levels. Further, even though sales declined from 1966 through 1968, supposedly anemic Cavalier was made to bear an allocated share which was several hundred thousands more of Seeburg's total administrative expense for intercompany operations in 1968 than it bore in 1966.

ing as Seeburg contends. Moreover, Seeburg itself has been responsible for much of Cavalier's lost business, by taking away over one-third of the lost Coca-Cola business of Cavalier through the expanded sales to Coca-Cola of its own subsidiaries, i.e., its own Choice Vend division. There is no reason to suppose that if competitively independent, Cavalier might not regain some portion of this business which Choice Vend gained after Seeburg's acquisition of Cavalier.

I also agree with the majority's rejection of Seeburg's argument that Cavalier could not survive in the industry because of its single line business as a bottle vending manufacturer in a period when the industry is trending towards multiple line businesses able to produce both can and bottle vending equipment. There seems to be validity to the point that multiple line sellers may have a competitive advantage in the vending machine industry. Nevertheless there are other single line companies like Cavalier in the business at present which remain competitive. The only instances cited of competitive disadvantages for single liners like Cavalier (e.g., multiple liners can give replacement credits on old general vending equipment applicable only to purchase of new bottling equipment; multiple liners can afford an elaborate training school for their servicemen, singles just a simple training program) do not appear to be formidable. There does not seem to be any reason why Cavalier, should it receive an order which depends on its being able to supply other vending lines in addition to its own, should not be able to get those lines from other manufacturers in order to be able to fill the order. Moreover, given adequate access to the capital market there would seem to be nothing to prevent Cavalier from expanding into broader vending markets.

I find equally unpersuasive Seeburg's argument that its own credit standing will be jeopardized if it is forced to sell to Cavalier. If, as Seeburg argues, Cavalier constitutes

an unprofitable operation, then divestiture of such an unprofitable concern should improve, not impair, its credit standing. Moreover, I do not believe that a company which has been found to have made an illegal acquisition can be heard to argue that it should be permitted to keep the fruits of this acquisition because it might suffer some financial reverses from having to divest.

Not only can I find no support in the record or in logic for the contention that divestiture here will hurt competition, I see positive competitive benefit from divestiture.

Divestiture will mean here that there will be an additional viable competitor in the sale of bottle and can vending machines. This is of great significance in view of the very concentrated nature of this market in which the number of firms is steadily diminishing through merger—from 15 in 1957 to 10 in 1964. Cavalier will be independent, and so will Seeburg's Choice Vend. Cavalier's future will no longer be subservient to or linked with Seeburg's Choice-Vend division, so that instead of having to assume a helpless posture as Choice Vend expands its own growing can-vending machine business to non-Coca-Cola customers (Pepsi-Cola, Seven-Up, etc.), it can remove itself from the Seeburg bridle and compete on its own for new forms of business; perhaps even gaining back the sales mentioned above which it lost to its sister subsidiary Choice Vend while both were a part of Seeburg.

Thus I cannot conclude that Cavalier's fortunes must be viewed as pessimistically as Seeburg would have us do. Nor do I believe that anyone can say now with any degree of certainty that a buyer would be unavailable or that the firm would fail. Rather, the income data show, if anything, just the opposite; and in this era of agressively shopping conglomerates, it seems inconceivable that nobody would want to pick up what is basically a healthy bundle of assets at a reasonable price.

April 10, 1969

APPENDIX G

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 8682

In the Matter of

THE SEEBURG CORPORATION,
a corporation

Initial Decision

Edgar A. Buttle, Hearing Examiner

Montgomery K. Hyun, William E. Barr, A. Roy Lavik and Raymond L. Hays, Counsel Supporting the Complaint

Frederick M. Rowe, James M. Johnstone and A. Paul Victor, Counsel for Respondent
Kirkland, Ellis, Hodson, Chaffetz & Masters
800 World Center Building
Washington, D. C.

STATEMENT AND HISTORY OF PROCEEDINGS

The complaint herein was issued by the Federal Trade Commission on April 22, 1966, and challenges the legality under § 7 of the amended Clayton Act (15 U.S.C. § 18) of The Seeburg Corporation's acquisition of Cavalier Corporation in December 1963.

Specifically the complaint alleges that the acquisition's effect "may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of vending machines of all types and in the manufacture and sale of bottle vending machines, in the United States" by (1) the elimination of "substantial actual and potential competition between" Seeburg and Cavalier, (2) the elimination of Cavalier "as a substantial independent competi-

tive factor" (3) substantially increasing "concentration in the manufacture and sale of vending machines and bottle vending machines", (4) substantially enhancing Seeburg's "competitive position to the detriment of actual and potential competition", and (5) inhibiting or preventing "the entry of new competitors into the manufacture and sale of vending and bottle vending machines" (Complaint, ¶ 19).

By its answer, filed May 31, 1966, as amended August 4, 1966, Seeburg denied the material allegations of the complaint, including particularly all of the alleged adverse competitive effects claimed to flow from the challenged acquisition (Answer, ¶¶ 5, 6, 17, 19).

In addition, as an affirmative defense, Seeburg challenged the Commission's jurisdiction on the grounds that the complaint's issuance "was based on procedures violative of the letter and spirit of the Administrative Procedure Act, the Freedom of Information Act of 1966, and the canons of administrative due process of law" (Ans., ¶ 20). On July 15, 1966, Seeburg filed a Motion to Vacate the Commission's Complaint on these same grounds. Respondent's Motion to Vacate the Complaint certified to the Commission by the hearing examiner on August 4, 1966, was denied by the Commission on October 25, 1966. Respondent's court action seeking an injunction and declaratory relief was dismissed on November 28, 1966 by the United States District Court for the Eastern District of Tennessee (Western Division). Respondent's Appeal from the District Court's said order is now pending before the U.S. Circuit Court of Appeals for the Sixth Circuit (*The Seeburg Corp.* v. *FTC*, appeal docketed, No. 17,606, 6th Cir., Dec. 12, 1966).

Beginning on June 16, 1966, and continuing until the hearings commenced on December 6, 1966, a total of eight prehearing conferences were held before the hearing examiner. During these conferences, conducted in part dur-

suant to agendas agreed upon by the parties beforehand, numerous preliminary matters were accomplished to facilitate the actual hearings and to make for an orderly proceeding.

For example, each party filed pretrial briefs (counsel supporting the complaint on June 30, 1966; Seeburg on August 12, 1966) and served upon the other side their proposed exhibits and a list of proposed witnesses. Both parties had ample opportunity to, and did, file objections in advance of trial to many of the proposed exhibits disclosed by the other side. Moreover, Seeburg conducted discovery of third parties by means of subpoenas issued by the hearing examiner.

Finally, underlying documents in support of sales data intended to be relied upon by the parties were made available for mutual verification in advance of trial, eventually enabling the parties to stipulate on January 11, 1967 as to certain sales data for Seeburg and other third party vending machine manufacturers (CX 247; RX 417). These stipulations obviated the necessity for detailed statistical proof, including the testimony of six statistical witnesses originally scheduled by counsel supporting the complaint.

In addition, the parties entered into a number of stipulations during the prehearing proceedings which facilitated the hearings. Thus, stipulations were obtained as to the genuineness of documents to be offered in evidence from the files of Seeburg and certain other companies in the vending industry (Tr. 12-14), to encourage a summarization of statistical data in the form of tables, graphs, etc. insofar as possible and as to the availability of underlying data for examination by opposing counsel (Tr. 14-15). Finally, the parties agreed that the "relevant geographic market in which to assess the alleged competitive effects of the acquisition challenged in this proceeding is the United States as a whole" (Tr. 15).

Pursuant to the hearing examiner's direction, both parties filed categorical allocations of evidence reflective of the theory of their case, indicating categorically the purpose of the documentation to be relied upon, prior to the trial commencement of their respective cases (complaint counsel on November 9 and 10, 1966, revised on December 29, 1966; Seeburg on February 20, 1967). These categorical allocations contributed considerably to an organized presentation by the parties, and enabled the hearing examiner to more readily understand the purpose of the testimony and exhibits received in evidence.

The hearings in this case commenced on December 6, 1966. During the hearings, complaint counsel introduced approximately 418 exhibits which were received in evidence and adduced the testimony of 27 witnesses, all except two of whom were, or had been associated with companies that are, or were, in various segments of the vending industry.[1] The remaining two witnesses were

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[1] The 27 witnesses and the pages at which their testimony appears in the transcript were: P. L. Hockman, President, Victor Products Corporation (Tr. 695-714, 744-76, 783-857; RX 461); Roy M. Small, Executive Vice President, Victor Products Corporation (Tr. 1254-1320; RX 418); Justin Funkhouser, Chairman of the Board, Victor Products Corporation (Tr. 1320-50); Robert O. McNearney, Secretary, UMC Industries Inc. (Tr. 1397-1412); Thomas B. Donahue, Vice Chairman of the Board, UMC Industries, Inc. (Tr. 1413-48); Glenn I. Carbaugh, Secretary and Legal Counsel, Vendo Company (Tr. 1454-74, 1488-91); John L. Burlington, Vice President, Sales and Marketing, Vendo Company (Tr. 1493-1509; 1515-30); Paul F. Selzer, Vice President, Sales, Vendo Company (Tr. 1541-61); George W. Hansen, Vice President in Charge of Engineering and Vice President for Vendo International (Tr. 1562-77, 1580-1603); William F. Swingler, Vice President, Canteen Corporation (Tr. 1616-49); Richard J. Mueller, Vice President, Rowe Manufacturing Division, Canteen Corporation (Tr. 1651-83); Frank Newman, Secretary, Canteen Corporation (Tr. 1683-86); Charles H. Brinkmann, formerly of Westinghouse Electric Corporation's Automatic Merchandising Division

members of trade associations connected with the vending industry.[2]

These industry witnesses explained the competitive realities of the vending industry, and particularly on the rapid changes developing therein in the years preceding and subsequent to the acquisition of Cavalier.

Also, during the hearings the examiner directed complaint counsel to make available to Seeburg's counsel certain correspondence in the Commission's files that may be "explanatory of some of the evidence adduced or which may be adduced" (Certification to the Commission, etc., Dkt. 8682, p. 2 (Feb. 3, 1967)). After complaint counsel declined to comply with the hearing examiner's direction, the matter, on February 3, 1967 was certified to the Commission, which by order of March 27, 1967, directed that the pertinent documentation be produced (Order Directing

(Tr. 1699-1723); William A. Ebner, Vice President, Sales, LaCrosse Cooler Company (Tr. 1728-34, 1742-46, 1758-64); Emmert T. Jansen, Vice President in Charge of International Operations and Secretary, Cornelius Company (Tr. 1765-72); Harold Teeter, President, Selectivend Inc. (Tr. 1776-97); Roy S. Steeley, Vice President and General Manager, Dixie-Narco Corp. (Tr. 1828-45); Frederic Dean, Vice Praesident, Castle Rubber Co. (Tr. 1904-19); J. E. Graham, Vice President, Sales, Cavalier Division, Seeburg Corp. (Tr. 1945-79); Max Miller, President, Choice-Vend Division, Seeburg Corp. (Tr. 1983-2004); Robert J. Jordan, Vice President, Sales, Choice-Vend Division, Seeburg Corp. (Tr. 2005-30); William J. Raoul, President, Cavalier Division, Seeburg Corp. (Tr. 2052-85); Delbert W. Coleman, Chairman of the Board, Seeburg Corp. (Tr. 2086-2115); William F. Adair, President, Seeburg Sales Corp. and Executive Vice President, Seeburg Corp. (Tr. 2116-46); Richard W. Funk, Legislative Counsel, National Automatic Merchandising Assn. (stipulated) (Tr. 2147-51); Dwight Reed, Assistant Executive Vice President, National Soft Drink Assn. (Tr. 2163, 2172); Edward G. Doris, Executive Vice President, Rock-Ola Manufacturing Company (Tr. 2192-2210).

[2] The two witnesses were: Dwight Reed and Richard W. Funk. The testimony of Mr. Reed was stricken by the hearing examiner as irrelevant and immaterial to the issues in the case (Tr. 2220-22).

Production and Ruling on Request for Plenary Consideration of Certification, Dkt. 8682 (March 27, 1967)).

On February 8, 1967, complaint counsel rested their case-in-chief.

Immediately thereafter, Seeburg made an oral motion to dismiss this proceeding on the grounds that complaint counsel had failed to "prove a prima facie case of the charges alleged in the Commission's complaint" (Tr. 2274). Pursuant to Rules § 3.6(e), the hearing examiner reserved decision on this motion pending completion of respondent's case-in-chief and the filing of proposed findings of fact and conclusions of law (Tr. 2275).

Thereafter, on February 15, 1967, Seeburg's counsel notified the hearing examiner and complaint counsel of respondent's decision not to present extended oral testimony in their defense "inasmuch as we believe that virtually all of the evidence which we originally contemplated in support of our defense, . . ., has been brought out during the case-in-chief, by direct testimony and cross-examination . . .," and of respondent's intentions of "rounding out the record in those areas where the evidence may warrant some corroboration and amplification" (Letter to the undersigned hearing examiner, Feb. 15, 1967).

Accordingly, Seeburg began its defense on March 1, 1967, consisting of a total of 171 exhibits which were received in evidence.

There being no rebuttal evidence adduced by complaint counsel, both sides rested their case on March 3, 1967.

On March 31, 1967, the hearing examiner granted motions requesting the examiner to permit the parties to supplement the record by the addition of certain documents.

The transcript of the entire proceedings totals 2,533 pages and 289 exhibits.

Initial Decision

The hearing examiner has carefully considered the proposed findings of fact and conclusions supplemented by briefs and reply briefs of complaint counsel and counsel for respondent, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Findings of Fact *

I. *Nature of the Business of Respondent The Seeburg Corporation*

1. The Seeburg Corporation, respondent herein, is a corporation organized and existing under the laws of the

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* In view of the clarity of a substantial amount of uncontradicted evidence, and in view of the accuracy of certain findings, the hearing examiner has adopted a considerable number of respondent's proposed findings with some amendments, as well as some proposed findings of complaint counsel. In doing so, the examiner makes the observation that the purpose of requiring proposed findings is so that they may be ruled upon specifically. The adoption, deletion, or amendment, therefore, constitutes such a ruling. The following cases clearly hold that their adoption does not detract from the weight to be given to them provided the findings are adequate: *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Edward Valves, Inc.* v. *Cameron Iron Works, Inc.*, 289 F.2d 355 (5th Cir. 1961), *cert. denied*, 368 U.S. 833 (1961); *Kinnear-Weed Corp.* v. *Humble Oil & Ref. Co.*, 259 F.2d 398 (5th Cir. 1958), *cert. denied*, 361 U.S. 903 (1959); *Penn-Texas Corp.* v. *Morse*, 242 F.2d 243, 247 (7th Cir. 1957).

The proposed findings of complaint counsel were rather limited in scope since complaint counsel apparently believe that a considerable number of the evidentiary facts received in evidence which have been proposed as findings by the respondent are immaterial even though complaint counsel made no objection thereto and in most instances offered the evidence themselves. However, it is observed that in filing a reply brief, complaint counsel did not seem to contest the accuracy of respondent's proposed findings, which in any event are supported by the record in every detail.

State of Delaware, with its principal office located at 1500 North Dayton Street, Chicago, Illinois (Cplt., ¶ 2; Ans., ¶ 2).[3]

2. Seeburg, directly or through its subsidiaries, is principally engaged in the manufacture and sale of coin-operated phonographs, various types of vending machines, background music systems, hearing aids, electronic organs, coin-operated amusement games and various string and band musical instruments (Cplt., ¶ 3; Ans., ¶ 3).

3. As of May 1964, Seeburg's subsidiary corporations and affiliated corporations were as follows:

Subsidiaries:

The Seeburg Sales Corporation
Chicago, Illinois

Seeburg International, Inc.
Chicago, Illinois

International Bally Coffee Vending Co.
Niles, Illinois

The Seeburg Real Estate Corporation
Chicago, Illinois

The essential differences in the proposed findings filed are that complaint counsel appear to advocate resolution by means of abstract principles or rules of law unassociated with all of the specific market facts evidenced, as distinguished from respondent's counsel who asserts that all of the market facts are material to resolution. The issues, therefore, emanate mostly from disagreement as to legal theory rather than from disagreement as to the evidentiary facts.

[3] Seeburg is the successor in interest to a corporation which was incorporated in 1906 under the name Fort Pitt Brewing Co. In 1956, Fort Pitt Brewing Co. purchased the operating assets of J. P. Seeburg Corp., a manufacturer of coin-operated phonographs, and in 1958 changed its name to The Seeburg Corporation, a Pennsylvania corporation. On March 30, 1962, the Pennsylvania corporation was merged with its Delaware subsidiary corporation and became The Seeburg Corporation, a Delaware corporation.

Seeburg Music Library, Inc.
Chicago, Illinois

American Sound Products, Inc.
Minneapolis, Minnesota

Universal Music Company, Ltd.
St. James, Manitoba, Canada

Subsidiaries of Seeburg Music Library:

Beatrice Music Co.
Chicago, Illinois

Fremont Music Co.
Chicago, Illinois

Affiliated companies:

Seeburg Automatic Products Pty. Ltd.
Australia

Serose Holding, Ltd.
Switzerland

Wholly-owned subsidiaries of Serose Holding, Ltd.:

Seeben, S.A.
Belgium

Seerome, S.P.A.
Italy

Seevend, G.m.b.H.
Germany

Phoenix Apparate, G.m.b.H.
Germany

Seeburg Limited
England

(CX 2A-B *in camera*)

4. Seeburg manufactures vending machines at three separate locations. The Chicago division located in Chicago, Illinois, manufactures under the "Seeburg" trade name all vending machines which Seeburg sells with the exception of bottle vending machines and can vending machines. The Choice-Vend Division, located in Windsor Locks, Connecticut, manufactures bottle vending machines and can vending machines; and the Cavalier Division, located in Chattanooga, Tennessee, also manufactures bottle vending machines and can vending machines (Adair, Tr. 2118, 2119, 2122, 2128-30, 2132, 2133; Miller, Tr. 1983; Raoul, Tr. 2054, 2055; CX 35B; CX 40, pp. 7, 9; CX 39, p. 8; CX 41 A-C; RX 83).

5. The vending machines manufactured at the Chicago plant are marketed by The Seeburg Sales Corporation, a wholly-owned sales subsidiary, through a nationwide network of distributors. For 1965, sales of vending machines by Seeburg Sales Corporation were approximately $14 million (CX 41A-C; CX 40, pp. 7, 9; CX 37A-C; CX 247, p. 2 *in camera;* Adair, Tr. 2118, 2119, 2122, 2129-40).

6. Bottle vending machines and can vending machines manufactured by Seeburg's Choice-Vend Division are sold under the "Choice-Vend" trade name, directly to customers throughout the United States. During 1965, sales of such vending machines by the Choice-Vend Division were approximately $8,130,000 (Jordan, Tr. 2009; CX 40, pp. 7, 9; CX 41A; CX 247, p. 2 *in camera*).

7. Bottle vending machines and can vending machines manufactured by Seeburg's Cavalier Division are sold under the "Cavalier" trade name, directly to customers throughout the United States. During 1965, sales of such vending machines by the Cavalier Division were approximately $9,248,000 (Graham, Tr. 1955-58, 1960, 1961; CX 40, pp. 7, 9; Raoul, Tr. 2054-55; CX 247, p. 2 *in camera*).

8. Products manufactured by Seeburg's various divisions and subsidiaries are sold to customers outside the United States and Canada by a wholly-owned subsidiary, Seeburg International, Inc. (CX 41A).

9. Seeburg sells coin-operated vending machines to vending operators through The Seeburg Sales Corporation and to soft drink bottlers through its Choice-Vend and Cavalier Divisions (CX 40, pp. 7, 9-10).

10. For the period 1960-1965, Seeburg's net sales, assets and net income were as follows:

Year Ended 10/31	Net Sales	Assets	Net Income
1960	$29,900,000	$20,000,000	$1,200,000
1961	35,200,000	27,500,000	1,100,000
1962	54,600,000	30,400,000	2,500,000
1963	59,900,000	36,300,000	2,800,000
1964	82,300,000	73,200,000	4,000,000
1965	89,700,000	85,900,000	600,000

(CX 7, pp. 7-9; CX 8, pp. 7-9; CX 9, pp. 9-11; CX 10, pp. 3-5; CX 33, pp. 13-15; CX 39, pp. 11-13)

11. During the fiscal year ending October 31, 1963, the last fiscal year prior to the challenged acquisition, Seeburg's net sales of all products manufactured totaled $54,581,306, and the dollar value of its assets was $36,258,288 (CX 10, pp. 3-4). During that year, Seeburg's sales of all coin-operated vending machines sold in the United States amounted to 41% of Seeburg's total net sales of all products (CX 247; CX 10, p. 3).

12. Seeburg entered the vending industry in 1958 when it acquired the "bankrupt" Eastern Electric Company Inc.'s cigarette machine (Coleman, Tr. 2087).

13. Seeburg continued to expand its line of vending equipment, adding coffee machines, soft drink cup and

bottle machines, and candy and pastry machines to its line as part of a program of diversification and, as also indicated by the testimony, "[i]n order to get competitive and compete, we found that we had to have a fuller line so as to satisfy the customer's requirements" (Coleman, Tr. 2092). In this connection, Seeburg made the following vending machine acquisitions, other than the one challenged by the instant complaint, between 1959 and 1964:

Year	Company	Product
1958	Eastern Electric Co., Inc.	cigarette vending machine
1959	Bert Mills Corporation	batch brew coffee machine
1959	Lyon Industries, Inc.	cup vending machine
1960	Choice-Vend Corporation	bottle vending machines
1961	Refrigeration Division, Brewer-Titchner Corp.	manual selector cold drink vendor
1961	Lion Manufacturing Corp. and subsidiary Bally Vending Corp.	single cup coffee machine [4]
1963	Pick-A-Pac, Vend-O-matic Sales, Inc.	nonfood all-purpose merchandiser
1964	Arthur H. DuGrenier, Inc.	candy, pastry, snack, cigarette, cigar, cigarillo, laundry supply machines [5]

(Cx 11, pp. 8-9; Coleman, Tr. 2086-95, 2096-2100)

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[4] Purchase price approximately $3 million.

[5] Purchase price approximately $1,072,000.

14. Seeburg's diversification included the acquisition, in February 1960, of substantially all the assets of Choice-Vend Corporation, which manufactured bottle and can vending machines. As Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, testified "[w]e viewed the bottle vending industry as an adjunct to vending and envisioned something—that some day the bottler would be moving into full-line vending. And this would give us an opportunity to sell our equipment as well as the equipment Choice-Vend was making. Choice-Vend at the time was a very small company" (Coleman, Tr. 2094).[6]

15. None of the foregoing acquisitions are challenged by the instant complaint (Cplt., ¶ 19).

16. On December 3, 1963, Seeburg acquired all the assets and business of Cavalier Corporation for a consideration approximating $11.8 million (Cplt., ¶ 11; Ans., ¶ 11; CX 15 A-Z-36; 10, p. 8). It is this acquisition which is challenged.

17. Seeburg is engaged in interstate commerce and is a corporation subject to the jurisdiction of the Federal Trade Commission (Cplt., ¶ 7; Ans., ¶ 7).

II. *Status of Cavalier Corporation Prior to Its Acquisition by The Seeburg Corporation*

18. Prior to December 3, 1963, Cavalier Corporation was a corporation organized and existing under the laws of Tennessee, with its office and principal place of business located at 1100 East Eleventh Street, Chattanooga, Tennessee (Cplt., ¶ 8; Ans., ¶ 8).

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[6] Purchase price approximately $1,016,000. Sales of Choice-Vend in the year prior to its acquisition were $1,600,000. Following its acquisition, the Choice-Vend Division moved into a new and substantially expanded plant with modernized production facilities at Windsor Locks, Connecticut. The expenditure for the construction and outfitting of the Windsor Locks plant was approximately $1.5 million.

19. At the time of the challenged acquisition in 1963, and for some years prior thereto, Cavalier was engaged in the manufacture of bottle and convertible bottle/can vending machines exclusively for sale to the company-owned and contract bottlers of Coca-Cola. In prior years, Cavalier had also manufactured certain furniture products and electric space heaters. Cavalier had discontinued these manufacturing activities by the time of the challenged transaction in 1963 (Graham, Tr. 1946-47; Raoul, Tr. 2053-61, 2064; CX 25; RX 83).

20. As of December 31, 1962, the last full year prior to the challenged acquisition, Cavalier reported net sales of $8,408,823 (CX 15Y) and assets totaling $7,199,070 (CX 21B).

21. Cavalier had been a supplier of "coolers" to the company-owned and contract bottlers of Coca-Cola since at least 1934, and had established a close relationship with the Coca-Cola parent syrup company over the years (Raoul, Tr. 2057-58, 2066). Cavalier's only attempt to sell to other than Coca-Cola bottlers, the so-called "trade" bottlers, which began in 1955, was unsuccessful, and it abandoned its efforts to sell to those bottlers in 1957, after two years (Graham, Tr. 1971-72; Raoul, Tr. 2066-75).

22. In November 1963, Cavalier, which was a defendant in a lawsuit alleging patent infringement instituted by The Vendo Co., settled this litigation out of court for $800,000 (CX 15-Z5).

23. Prior to the challenged acquisition in 1963, and at all times pertinent to this proceeding, Cavalier was a corporation engaged in "commerce" (Cplt., ¶ 10; Ans., ¶ 10).

III. *Relevant Geographic Market*

24. As stipulated by the parties "The relevant geographic market in which to assess the alleged competitive

effects of the acquisition challenged in this proceeding is the United States as a whole" (Stip., Tr. 15).

IV. *Nature of the Vending Industry Generally*

25. The vending industry is a large and growing segment of the economy in which foods, drinks, cigarettes, and related products are distributed to the public through coin-operated vending equipment placed and serviced in numerous public and private locations by two basic types of organizations, vending operators and soft drink bottlers (Donahue, Tr. 1418-21; Swingler, Tr. 1623, 1630-33, 1637-39; RX 421A, E; 443, pp. 2, 4, 7-8; 444, pp. 2-4; 446, pp. 5, 17, 19-20; 442, p. 7; 441, p. 5; 388A-C; 397A-B; 398A-C; 389A-G; 390A-E; 487L-M; 395; 396A-D; 399).

26. This growth has been related to the development of efficient and attractive vending equipment which is increasingly used to more economically and conveniently serve the needs of the consuming public, particularly in locations where cafeteria operations were frequently "losing situations", such as industrial plants, schools and hospitals (Swingler, Tr. 1630). "Because of advancing technology and the combining of food services and vending skills, many institutional and industrial organizations are for the first time becoming prospects for the type of service" provided by vending operators and soft drink bottlers (RX 459, p. 7).

27. In 1963, the year of the challenged acquisition, total sales of all products through vending machines approximated $3.2 billion, up from some $600 million in 1946 (RX 421A).

A. *Manufacturing Segment of the Vending Industry*

28. According to Census data, there were at least 76 companies manufacturing coin-operated vending equipment at the time of the challenged acquisition in 1963 (CX 98).

In that year these manufacturers reported sales of 606,665 vending machines with a dollar value of $163.5 million (CX 100).

29. Coin-operated vending machines have been described as "a cabinet with a vending mechanism and . . . storage therein which, with the insertion of a coin, . . . would release a product, unattended" (Small, Tr. 1258). Generally, all coin-operated vending machines have the same type of basic operating components. All coin-operated vending machines contain a cabinet with a door inside of which is storage space, a coin mechanism which accepts good coins and rejects slugs, and activates a circuit and produces the product to be vended. All coin-operated vending machines have a vend mechanism, which releases one product and holds back the other products in the storage area upon the insertion of a coin (Small, Tr. 1258-63; Donahue, Tr. 1424-25, 1427; Hansen, Tr. 1563-64; Mueller, Tr. 1655-56).

30. Some components of coin-operated vending machines differ depending upon the product being dispensed (Small, Tr. 1262-63; Donahue, Tr. 1422-23). For example, the vending mechanism for an instant coffee machine is a relatively simple device, whereas the vending mechanism for a batch brew coffee machine is somewhat more complicated because the former machine uses powdered ingredients while the latter machine must actually brew freshly ground coffee (Mueller, Tr. 1660-61).

31. All coin-operated vending machines have the same basic physical characteristics and are a homogeneous category of equipment in terms of their basic function of dispensing the desired product to purchasers upon the insertion of a coin (Small, Tr. 1258-63; Hansen, Tr. 1563).

32. The following table shows the stipulated sales of all coin-operated vending machines in the United States in 1963 on a unit and dollar basis, by manufacturers of such

equipment whose representatives testified at the hearing in this case:

Company	1963 Unit Sales	1963 Dollar Sales
The Vendo Company	82,248	$39,547,470
Universal Match Corp.	46,123	18,518,565
Canteen Corp.	33,393	20,095,378
The Seeburg Corp.	27,115	22,572,000
Cavalier Corp.	23,164	8,269,000
Westinghouse Electric Corp.	20,520	8,999,000
The Cornelius Co.	12,960	2,231,767
LaCrosse Cooler Co.	7,790	2,614,000
The Selectivend Corp.	5,463	2,248,489
Victor Products Corp.	4,586	2,654,077
Dixie-Narco, Inc.	1,879	1,391,236

(CX 226, 247; RX 468)

33. *The Vendo Company.* At the time of the challenged acquisition in 1963, Vendo was the only manufacturer of a complete line of vending equipment, including machines which dispense hot and cold drinks, hot and cold foods, candy, snacks, cigarettes, coffee and pastry, that sold to all classes of vending machine customers (RX 457, pp. 18-19), with sales of $39,547,470 (CX 226) and 82,248 units (RX 468). Vendo also was the only approved manufacturer of upright bottle and can vending machines marketing those machines to all classes of soft drink bottler customers. In that year, Vendo's sales of all bottle vending machines sold in the United States totaled $16,705,300 (CX 225) and 46,836 units (RX 469).

34. *UMC Industries, Inc.* Another important factor in the vending industry at the time of the challenged acquisition in 1963 was Universal Match Corporation (today UMC Industries, Inc.) which reported sales of coin-operated vending machines of $18,518,565 and 46,123 units (CX

226; RX 468). At the time of the challenged transaction, UMC, through its several vending machine manufacturing subsidiaries acquired since 1956, manufactured a relatively full line of vending machines, including those which dispense foods, cigarettes, candy, pastry, snacks and cold drinks, for sale to all classes of customers except non-Coca-Cola bottlers (Donahue, Tr. 1416; CX 66, p. 7; 67, p. 4; 71, pp. 8-9, 12).

35. *Canteen Corporation.* Also, in 1963, Automatic Canteen (today Canteen Corporation) was another manufacturer of coin-operated vending equipment. Canteen, which was also the largest vending operator in the United States (Swingler, Tr. 1619), had entered the manufacturing segment of the vending industry in 1955, when it acquired one of the industry's leading manufacturers, Rowe Manufacturing Company, which was primarily a manufacturer of cigarette and candy machines (Swingler, Tr. 1618). In 1963, Canteen's Rowe Manufacturing Division manufactured a full line of vending machines, including those which dispense hot and cold drinks, hot and cold food, snacks, candy, cigarettes and coffee, with the exception of bottle and can vending machines, and reported vending machine sales of $20,095,378 and 33,393 units (CX 226; RX 468).

36. *The Seeburg Corporation.* In 1963, Seeburg reported $22,575,000 in sales of coin-operated vending machines, comprising 27,115 machines on a unit basis (CX 226; RX 468).

B. *Purchasers of Vending Equipment*

37. Traditionally, the many different types of vending machines manufactured have been purchased by two basic types of customers: (a) vending operating companies, and (b) soft drink bottling firms (Hockman, Tr. 759-62; Funkhouser, Tr. 1344-45; Burlington, Tr. 1499; Selzer, Tr. 1553-54; Brinkmann, Tr. 1706-07).

1. *Vending Operating Companies.*

38. Vending operating companies, often referred to as "operators" or "vendors", are organizations which purchase and place banks of vending machines "on locations of various types", such as "industrial plants, offices, institutions, hospitals and furnishes the product in these locations" (Swingler, Tr. 1620-21; Funkhouser, Tr. 1345), and provide the necessary food and mechanical service to these machines.

39. Among the prominent vending operator companies in the United States, at the time of the acquisition in 1963 and today, are the following:

Canteen Corporation (RX 446)
Servomation Corporation (RX 443)
Automatic Retailers of America, Inc. (RX 459)
ABC Consolidated Corporation (RX 490)
The Macke Company (RX 444).

40. These vending operating companies are substantial enterprises and have experienced a substantial growth in sales and operations over the past decade. For example, Canteen Corporation, the largest "vendor" in the United States (Swingler, Tr. 1819), reported an increase in sales from $224 million in 1962 to $313 million in 1966 (RX 446, p. 17). Similar rapid increases were recorded by other vending operating companies, such as Servomation Corporation (from $68 million in 1961 to $161 million in 1966, RX 443, p. 6), The Macke Company (from $20 million in 1961 to $68 million in 1966, RX 459, p. 4), and ABC Consolidated Corporation (from $91 million in 1956 to $140 million in 1965, RX 490, pp. 22-23).

41. Vending operating companies purchase substantial quantities of vending equipment in order to carry out their operations and serve their markets adequately. For ex-

ample, in 1966, Servomation Corporation had 92,800 vending machines in operation, up from 71,200 in 1964 (RX 443, p. 2). Also, Automatic Retailers of America, Inc. had over 97,000 vending machines in operation in 1965 (RX 459, p. 9), and The Macke Company had over 45,000 machines "producing revenue daily" in 1966 (RX 444, p. 3).

2. *Soft Drink Bottlers*

42. Basically, soft drink bottling firms bottle and distribute soft drinks made from syrup manufactured by the various soft drink syrup manufacturers (parent syrup companies) in bottles, cans, and cups; through various means, including vending machines, in various locations. While most soft drink bottling firms are independent franchises, parent syrup companies also own bottling plant subsidiaries (Graham, Tr. 1968; RX 289C-D).

43. In connection with their vending operations, soft drink bottlers purchase vending equipment which dispenses soft drinks in bottles, cans, bottles and or cans and through cups, and place them in various locations (Hockman, Tr. 747, 769; Small, Tr. 1256; Donahue, Tr. 1417, 1429; Burlington, Tr. 1495; Selzer, Tr. 1546; Brinkmann, Tr. 1702; Raoul, Tr. 2064).

44. Representatives of vending machine manufacturers testified that many of the machines manufactured and used by soft drink bottlers to dispense bottled soft drinks are easily adaptable to dispense canned soft drinks in a short period of time and for very little cost (Hockman, Tr. 768-70; Small, Tr. 1266-67; Jordan, Tr. 2009; Brinkmann, Tr. 1704, 1707-08). Some of these machines are convertible through the simple adjustment of "risers" (Small, Tr. 1266-67) and others through the use of conversion kits (Brinkmann, Tr. 1707-08; RX 63 A-B, 57, 427 A, 139 A).

45. Selectivend Inc. in 1965 developed a "conversion kit for our visual selective models" which "will easily and in-

expensively convert any row in these vendors to one way glass and cans. The unit can then accommodate returnables, one way glass or cans" (RX 139 A).

46. In 1965, Selectivend also "developed a new five-flavor automatic" which is "unique in that we can vend returnable glass, one way glass, or cans (12 oz. and 10 oz.). The additional cost for change-over is only twelve cents and five minutes" per shelf (RX 139 B, 140 A).

47. Soft dring bottlers have been, and still are, the largest single class of customers for bottle and bottle can vending machines manufactured and sold in the United States (Hockman, Tr. 703; Burlington, Tr. 1500; Brinkmann, Tr. 1702; Miller, Tr. 1986; CX 247; RX 417).

48. Many soft drink bottling firms are substantial business enterprises with significant sales. For example, The Coca-Cola Bottling Company of Los Angeles reported total sales of $25 million in 1965, up from $21 million in 1961 (RX 439, p. 14). The Coca-Cola Bottling Company of New York reported sales of $50 million in 1965, an increase from $36 million in 1961 (RX 442, p. 18). The Coca-Cola Company, i.e., the parent syrup company, which reported sales of nearly $864 million in 1965 (RX 473, p. 3), owns some 40 soft drink bottling subsidiaries in the United States (Graham, Tr. 1968). Pepsi-Cola General Bottlers, Inc., which operates in four major marketing areas spread out over six states, has increased its sales from $14 million in 1956 to $45 million in 1965 (RX 441, pp. 9-10). In addition, many parent syrup companies make available financial assistance to their franchised soft drink bottling firms in connection with their purchases of vending equipment (Small, RX 418, p. 5; RX 436 A, 267, 128, 195 A, 424 A, 289 D).

49. According to the stipulated sales figures for manufacturers from whom witnesses testified at the hearing, soft drink bottlers purchased some $47 million worth of

bottle or bottle/can vending machines in 1963, the year of the challenged acquisition (CX 247; RX 417).

a. *Historical Development of the Coca-Cola/"Trade" Bottler Customer Dichotomy*

50. Historically, Coca-Cola was the leader in the development of a program for the dispensing of soft drinks in bottles in vending machines. William G. Raoul, formerly President of Cavalier Corporation and now President of the Cavalier Division of The Seeburg Corporation, testified:

> "Coca-Cola Company focused as long ago as 1930, in promoting the sale of the product chilled for consumption on the premises. What we call the cold-bottle market. So it had gone through a long development. The bottlers of Coca-Cola had service departments and a lot of their business was concentrated in this field and it was a regular thing with them" (Raoul, Tr. 2072-73).

51. Development of this on the premises cold bottle market "was quite different" "in the rest of the trade" (Raoul, Tr. 2073). As Mr. Raoul testified, "some had sold a few coolers, some had not. It just followed a different evolution" (Raoul, Tr. 2073). Non-Coca-Cola, i.e., "trade" bottlers, at first did not have the "orientation towards what we call the" cold bottle market "that we find in the Coca-Cola industry. Their attitude was just different" (Raoul, Tr. 2069).

52. Manufacturing considerations also contributed to this historic dichotomy. According to record evidence, received without objection from counsel supporting the complaint:

> "Machines which are built in the design program of The Coca-Cola Company are not readily adaptable to the different appearance requirements of other par-

ent companies. Furthermore the general soft-drink trade is accustomed to somewhat different services from the manufacturer. Because of the wide variation in bottle sizes and shapes it is customary for the manufacturer to fit up the machine completely for specified bottles before shipment, and to install coin-handling equipment and advertising signs. The manufacturer serving this field must be prepared to finish his machines in a number of different color schemes, whereas the manufacturer serving Coca-Cola has only one basic scheme. Machines for Coca-Cola bottlers are not ordinarily fitted up for bottles before shipment nor equipped with coinage and signs. These are shipped separately, a system which grew up in the Coca-Cola field years ago and which has been followed ever since. The manufacturer serving the general soft-drink trade has totally different space requirements from his competitor who deals with Coca-Cola. The latter finishes and packs his machines as they come off the assembly line—in fact finishing is done *before* assembly. The supplier to the general trade holds a large part of his inventory in a base coat only, and uncrated, so that he can fit up the machines for the various franchises on receipt of orders" (RX 450 B-C; cf. Raoul, Tr. 2072-73; Hansen, Tr. 1567-69; Hockman, Tr. 776).

53. Coca-Cola bottlers, of which there are approximately 1,000 (RX 289 A), are also deemed "the wealthy" and "more aggressive bottlers" (Coleman, Tr. 2113).

54. Industry witnesses have recognized this historical dichotomy among soft drink bottler customers, and customarily refer to them as Coca-Cola bottlers on the one hand, or "other than Coca-Cola bottlers" or "trade bottlers" on the other hand (Small, Tr. 1299; Selzer, Tr. 1546-48; Miller, Tr. 2002; Raoul, Tr. 2066-72; RX 457, p. 19).

55. According to the stipulated sales data, slightly over 53% of the bottle and can vending machines sold to all soft drink bottlers in 1963 on a unit and dollar basis were sold to Coca-Cola bottlers, with the balance sold to the non-Coca-Cola or so-called "trade" bottlers (CX 247; RX 447, 485, 486).

b. *Equipment Approval Programs for Bottle and Can Vending Machines*

56. Historically, in both the Coca-Cola and "trade" bottler segments, vending equipment manufacturers have submitted their soft drink vending equipment to the parent syrup companies for their approval or acceptance prior to offering such equipment for sale to their wholly-owned and franchised bottlers (Small, Tr. 1294-95; Hansen, Tr. 1591-92; Ebner, Tr. 1759).

b-1. *Coca-Cola Approval Program*

57. Coca-Cola's equipment approval program appears to have been the most formal and fully developed of such programs at the time of the challenged acquisition (RX 289A-D, 238 A-D, 239 A-B, 70 A-Y, 221, 225 A-C, 223 A-C, 226 A-C).

58. On August 6, 1957, Coca-Cola established the equipment acceptance program it had in effect at the time of the challenged acquisition in 1963 (RX 289 A). Under this program, when a bottle vending machine is found "acceptable", this "means to bottlers that such machines are considered satisfactory for their intended purpose, have been laboratory and/or field tested, and have been found acceptable to the standards established by The Coca-Cola Company" (RX 289 A-B).

59. The "purposes and objectives" of Coca-Cola's program were twofold: (a) "to provide several lines of vending equipment for Coca-Cola that are representative of

the high quality characteristic of that product"; and (b) "to assure bottlers of Coca-Cola an advance evaluation of a broad selection of equipment having highest merchandising appeal, designed and built in a manner to operate with maximum efficiency and minimum maintenance and service costs" (RX 289 B).

60. In actual operation, even if a vending machine submitted for testing and approval was not objectionable from the standpoint of mechanical or engineering defects, Coca-Cola declined the approval of the machine when it felt there was "a limited market for equipment of this type and size, and an additional supplier was not required" (RX 166A-B).

61. As of 1962, Coca-Cola applied its equipment approval program to limit the number of approved suppliers of bottle vending equipment to Coca-Cola bottlers. As Sam N. Gardner, Coca-Cola's Vice President in Charge of Bottler Sales Promotion, advised one supplier of machines on July 2, 1962:

> "... we do not feel it would be to our advantage to further broaden the line of coolers now being offered by the several manufacturers unless a specific cooler fills a specific gap in the line, and therefore would be extremely reluctant to recommend approval of an additional cooler to the [Sales Equipment] Committee under any other circumstances" (RX 162; RX 273, 166 A-B, 289 A-D, 434 B-C).

62. As part of its equipment approval program, it was customary for the Coca-Cola parent syrup company to work closely with its traditional approved suppliers to modify and correct any mechanical and engineering defects found in their bottle and can machines to facilitate approval (Brinkmann, Tr. 1715-16; Hansen, Tr. 1591; RX 289 C, 291 A-B, 238 A-D, 239 A-B, 44, 46, 47 A-B, 70 A-Y, 221, 225

A-C, 223 A-C, 226 A, 209, 334 A-B, 346 A-C). Thus, Coca-Cola transmitted to its traditional suppliers copies of its engineering evaluation of machines submitted for approval, which contain useful information identifying any defects discovered, offered possible solutions or modifications (RX 70 A-Y, 221, 225 A-C, 223 A-C, 238 A-D), and otherwise cooperated with these manufacturers to facilitate ultimate equipment approval (Brinkmann, Tr. 1715-16; Hansen, Tr. 1591; RX 334 A-C, 346 A-C, 291 A-B, 44, 46, 51, 226 A-B, 209).

63. In particular, Coca-Cola would customarily work with its traditional suppliers to correct any refrigeration and sweating problems in machines submitted for approval, and ultimately to work out such problems to the satisfaction of all concerned (Hansen, Tr. 1598-99; RX 346 A-C, 291 A-B, 70 A-C, 221, 225 A-C, 223 A-C, 226 A-B, 209, 200 A-B).

64. Coca-Cola approval resulted in important advantages for approved suppliers. For example, such approval entitled the manufacturers' equipment to be listed in Coca-Cola's "Catalog of Merchandising Equipment for Coca-Cola" (RX 173 A-B). In addition, Coca-Cola would send a formal notification to all its bottlers advising of approval of the specific machines (RX 67). Finally, the approved manufacturer was eligible to participate in Coca-Cola's "cold drink incentive program" designed to "increase the number of coolers . . . shipped and placed by bottlers" (RX 241 A-C).

65. Prior to the challenged acquisition, the only time Coca-Cola departed from its policy of approving only traditional, established suppliers was when the Cornelius Company developed a unique horizontal bottle vendor designed to serve a specific need in 1962 (RX 162, 173).

66. The Cornelius horizontal bottle vendor "is a small compact unit where the dispensing of the bottle is done by

lifting a lid and moving the bottle through a track or over to a release mechanism and inserting a coin that will unlock the release mechanism and then the bottle is vertically withdrawn" (Jansey, Tr. 1768), and is a substantially different machine than the ordinary upright bottle vending machine (Ebner, Tr. 1761; RX 173 A-B).

67. Cornelius' horizontal bottle vendor was attractively styled, had "the appearance of fine furniture" (RX 173 A), and was particularly suitable for "prestige" or "style-conscious" locations not generally amenable to the larger upright bottle vendors (RX 173 A, 172 B, 308 E). Thus, this machine, which had the advantages of "compactness and low cost" (RX 173 A) was frequently placed in such locations as beauty parlors, barber shops, offices, waiting rooms, medical clinics, and other locations "never before considered vendor prospects" (RX 173 A-B, 172 A-B, 308 E-G).

68. Recognizing the uniqueness of the Cornelius machine, Coca-Cola, "after considerable delay", finally approved this unit, anticipating "that its availability will serve to further stimulate cooler placements across the country" (RX 162).

69. When approving the Cornelius horizontal bottle vendor for sale to Coca-Cola bottlers and thereby "authorizing use of the [Coca-Cola] trade-mark on it", Coca-Cola made it clear that it was not altering its equipment acceptance program, which generally confined acceptance to machines of Coca-Cola's traditional suppliers (RX 162). As Sam N. Gardner, Coca-Cola's Vice President of Bottler Sales Promotion, stated in the letter dated July 2, 1962, advising Cornelius of its approval of the horizontal bottle vendor:

> "I do not believe it would be well for The Cornelius Company—or, for that matter, any other company—to assume that acceptance of this particular cooler,

which fills a specific need, would in any way affect consideration of other models that might be designed by your company—or any other company—in the future. In other words, we do not feel it would be to our advantage to further broaden the line of coolers now being offered by the several manufacturers unless a specific cooler fills a specific gap in the line, and therefore would be extremely reluctant to recommend approval of an additional cooler to the [Sales Equipment] Committee under any other circumstances" (RX 162; cf. RX 273).

70. Cornelius was not an approved supplier to Coca-Cola bottlers of automatic upright bottle and can vending machines (RX 434 C).

b-2. *"Trade" Bottler Approval Programs*

71. Similar equipment approval programs serving the same purpose as Coca-Cola's were conducted by the various "trade" bottler parent syrup companies, i.e., Pepsi-Cola Company, Royal Crown Cola Company, Seven-Up Company, Canada Dry Corporation, and Dr. Pepper Company (Small, Tr. 1295; Ebner, Tr. 1759-60; Teeter, Tr. 1797; RX 122 A, 101, 105, 128, 119, 137 A-B, 195 A-B, 356, 424 A-B, 430 A-B, 429, 425, 422 A-B, 423). Thus, in the course of securing approval, traditional suppliers and parent syrup companies customarily cooperated in making corrections and modifications of engineering or mechanical defects which become apparent during testing of the vending equipment. As Roy M. Small, Executive Vice President of Victor Products Corporation, testified, it was customary for parent syrup companies to cooperate with the supplier to iron out deficiencies in equipment (Small, RX 418, p. 9).

72. Once parent syrup company approval of their machines was secured, "trade" bottler suppliers had avail-

able the benefits flowing therefrom. As Justin Funkhouser, Chairman of the Board of Victor Products Corporation testified, upon approval the parent syrup company would release "notification to their franchised bottlers and in substance say, 'We can recommend this particular model unit manufactured by Victor Products Corporation for your use.' And, concurrently, make it known to their franchised bottlers that if they buy this equipment it would be eligible for parent company finances (sic) support" (Funkhouser, Tr. 1342). Similarly, William A. Ebner, Vice President in Charge of Sales for LaCross Cooler Company, testified that without approval, "we are not able to manufacture a product in their (parent syrup companies') identification, and as a consequence, the bottlers would not be receptive to purchasing our product and, number two, we would not be a participant in the special incentive programs, or this type of thing that the parent company might put on as inducement for" a bottler to purchase machines (Ebner, Tr. 1759). Thus, parent syrup company approval gave suppliers assurance (RX 128, 151 A-C) that an approved machine would be eligible for participation in parent syrup companies' incentive programs (RX 128, 271 A-D, 195 A-B), and that parent syrup company financing would be available for the approved machine (RX 195 A).

b-3. *Necessity for Parent Syrup Company Approval*

73. Although failure to obtain parent syrup company approval does not entirely preclude an equipment manufacturer from soliciting sales of equipment to a particular class of bottlers, no company can "successfully market" such equipment without parent syrup company approval (Small, Tr. 1294-95, 1297-98; Brinkmann, Tr. 1717; Ebner, Tr. 1759; Teeter, Tr. 1797; Steeley, Tr. 1843-44; cf. RX 122 A, 101, 128, 137 A-B, 271 A-B, 195 A, 424 A, 423, 166 A, 66 A-B, 67, 162, 173 A-B).

c. Coca-Cola and "Trade" Bottler Purchasing Patterns

74. At the time of the challenged acquisition in 1963, soft drink bottlers purchased their bottle and can vending machines from manufacturers who generally served either one or the other of the two distinct classes of customers, Coca-Cola or "trade" bottlers (Small, Tr. 1299; Donahue, Tr. 1433, Tr. 1429; Brinkmann, Tr. 1702-03; RX 40 C).

75. Typical of the industry's recognition of this historic split is the testimony of Roy M. Small, Executive Vice President of Victor Products Corporation, concerning the meaning of the term "other side of the street", as used in the industry with respect to the sale of vending machines. Mr. Small testified that "[d]epending on what side of the street you are on[,] [i]t is has always referred to the industry as Coca-Cola suppliers, or other than Coca-Cola suppliers" (Small, Tr. 1299). In other words, "if you sell to Coca-Cola Company, you don't sell to other companies" (Small, Tr. 1299). This was corroborated by the testimony of many other industry witnesses who testified that their soft drink vending equipment customers were either Coca-Cola or "trade" bottlers (Hockman, Tr. 775; Donahue, Tr. 1429, 1433; Brinkmann, Tr. 1702-03; Ebner, Tr. 1758).

76. As of the time of the challenged acquisition in 1963, no manufacturer successfully marketed its conventional upright bottle and can machines to "both sides of the street" from the same manufacturing facilities and under the same trade name. The only departure was the Cornelius Company, whose low-cost unique horizontal bottle vendor was suitable for placement in new and specialized locations (Donahue, Tr. 1429; Burlington, Tr. 1519-21; Raoul, Tr. 2067-75; Small, Tr. 1299; RX 450 A-F, 316 C-D, 162, 40 C, 457, p. 19, 173 A-B, 172 A-B, 308 A-H, 175).

c-1. Coca-Cola Bottler Suppliers

77. At the time of the challenged acquisition in 1963, the Coca-Cola parent syrup company had approved the bottle

and can vending equipment of five suppliers of upright bottle and can vending machines, with whom it worked cooperatively and closely over the years to perfect their machines.

78. As of 1962, Coca-Cola had approved the bottle and can vending equipment of only Vendo (Tr. 1518; RX 346 A-C), Cavalier (Tr. 2064; RX 66 A-B), Westinghouse (Tr. 1703; RX 239 A-B), Jasco (Tr. 1429; RX 226 A-B), and Dixie-Narco (Tr. 1843; RX 200 A-B).[7] Most of those companies had been approved Coca-Cola suppliers for over 30 years (Brinkmann, Tr. 1714-15; Donahue, Tr. 1419; Raoul, Tr. 2053, 2056-57; CX 65, p. 7) and had solicited only the bottle and can vending machine business of Coca-Cola bottlers on an exclusive basis. Although Vendo also solicited the business of "trade" bottlers separately through its Vendorlator operations, it maintained separate facilities and a separate "specialized sales force" to sell an exclusive line of machines to Coca-Cola bottlers (Burlington, Tr. 1518-21; Selzer, Tr. 1546-49; RX 457, p. 19, 315, 316 C-D, 318 A-D).

79. As late as 1965, one and one-half years after the challenged acquisition, Coca-Cola's approval of soft drink bottle vending machines was limited to five suppliers (RX 492 A-B). Coca-Cola listed "Cavalier Corporation" as an approved supplier even though Cavalier had by that time become a Division of The Seeburg Corporation (RX 492 A).

80. The following charts, Respondent's Exhibits 474 and 475, reflect sales of coin-operated bottle vending ma-

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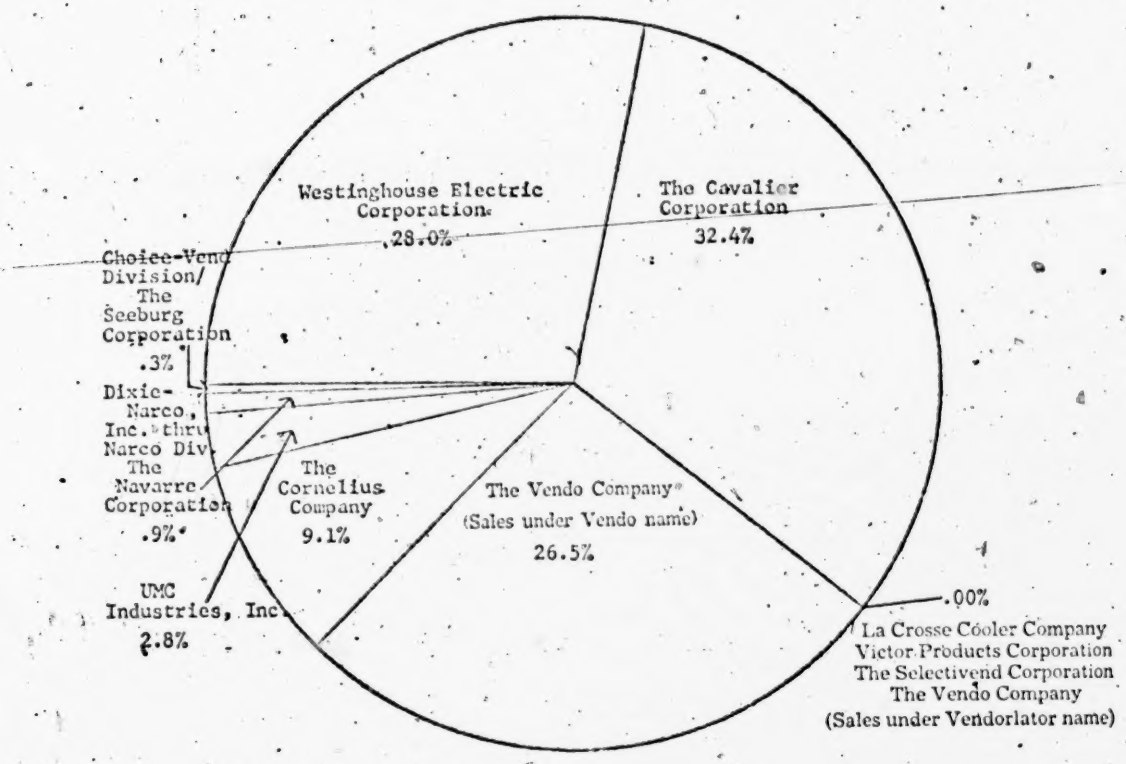
[7] Some of Vendorlator Mfg. Co.'s machines had been approved by Coca-Cola when the equipment approval program originated in 1957 (CX 250 F). However, shortly after its acquisition by Vendo in 1956, Vendorlator no longer solicited Coca-Cola bottlers, but sold bottle and can vending machines to "trade" bottlers only (Burlington, Tr. 1518-21, 1528-29; RX 457, p. 19, 318 B-C).

chines as a percentage of stipulated sales of such machines to Coca-Cola bottlers on a unit and dollar basis in 1963, the year of the challenged acquisition:

RESPONDENT'S EXHIBIT 474

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN UNITS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO COCA-COLA BOTTLERS
FOR 1963



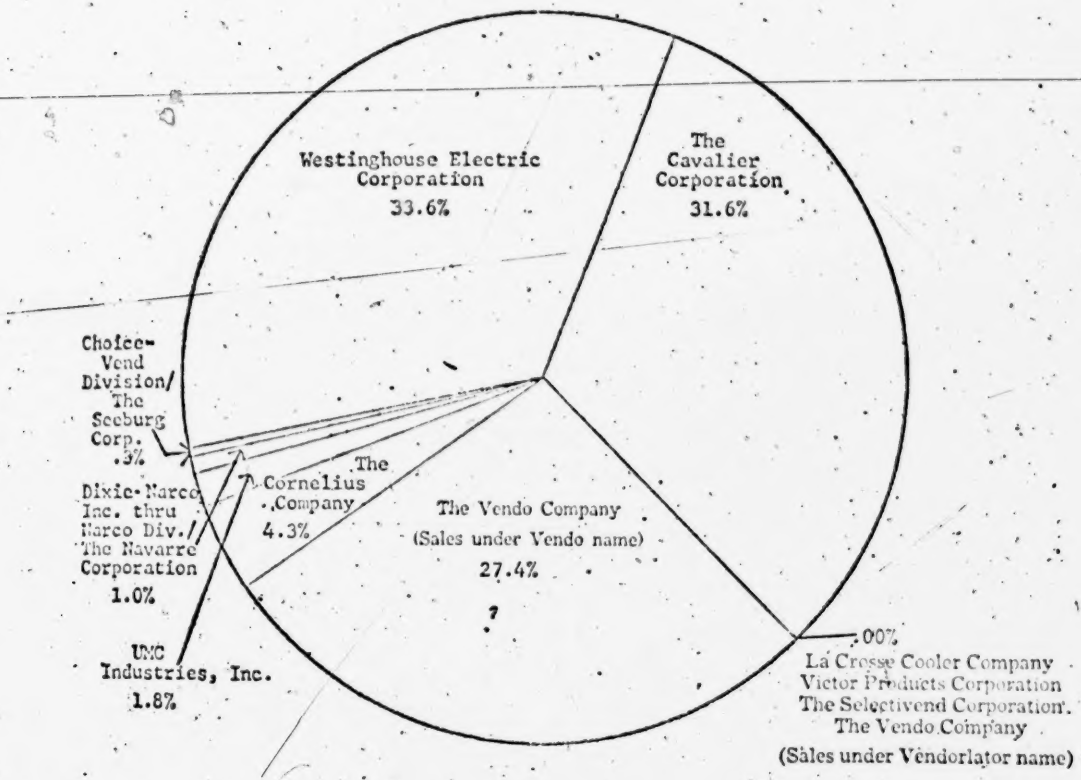
Source:

CX 247

RX 417

RESPONDENT'S EXHIBIT 475

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN DOLLARS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO COCA-COLA BOTTLERS
FOR 1963



Source:
CX 247
RX 417

81. According to the stipulated sales of bottle vending machines to Coca-Cola bottlers in 1963, the year of the challenged acquisition, over 90% of the sales of such machines to Coca-Cola bottlers were made by only three of the accepted suppliers, Vendo, Westinghouse, and Cavalier (RX 474-75).

82. In addition, according to stipulated sales data, sales of Cornelius' unique horizontal bottle vendor represented 9.1% of bottle vending machine sales to Coca-Cola bottlers on a unit basis and 4.3% on a dollar basis at the time of the challenged acquisition (RX 474-75).

83. On the other hand, at the time of the challenged acquisition, the traditional "trade" bottler suppliers, whose equipment was not approved by the Coca-Cola parent syrup company, made virtually no sales of bottle and can equipment to Coca-Cola bottlers and did not solicit the business of that class of customers (Hockman, Tr. 776; Small, Tr. 1300; Ebner, Tr. 1743-44; Teeter, Tr. 1784-85; Miller, Tr. 1986-87; Coleman, Tr. 2107; Selzer, Tr. 1544; CX 247; RX 474-75, 417).

84. Although Seeburg's Choice-Vend Division made a few sales of bottle vending machines to Coca-Cola bottlers at the time of the challenged acquisition, in 1963 these sales were negligible, amounting to .3% of stipulated sales of that type of machine made to that class of customers on a unit and dollar basis (Miller, Tr. 1987; Coleman, Tr. 2107; RX 474-75). Since it did not have Coca-Cola approval, Choice-Vend's "sales force did not solicit Coca-Cola bottlers", and "obtained what little business there was through conventions, meeting the bottlers at the conventions, their seeing our equipment, and word of mouth" (Miller, Tr. 1986-87, 1993; Selzer, Tr. 1544). Other "trade" bottler suppliers, i.e., Victor Products, Selectivend, La-Crosse, Vendo, under the Vendorlator name, reported no

sales of bottle and can vending machines to Coca-Cola bottlers in 1963 (RX 474-75).

c-2. *"Trade" Bottler Suppliers*

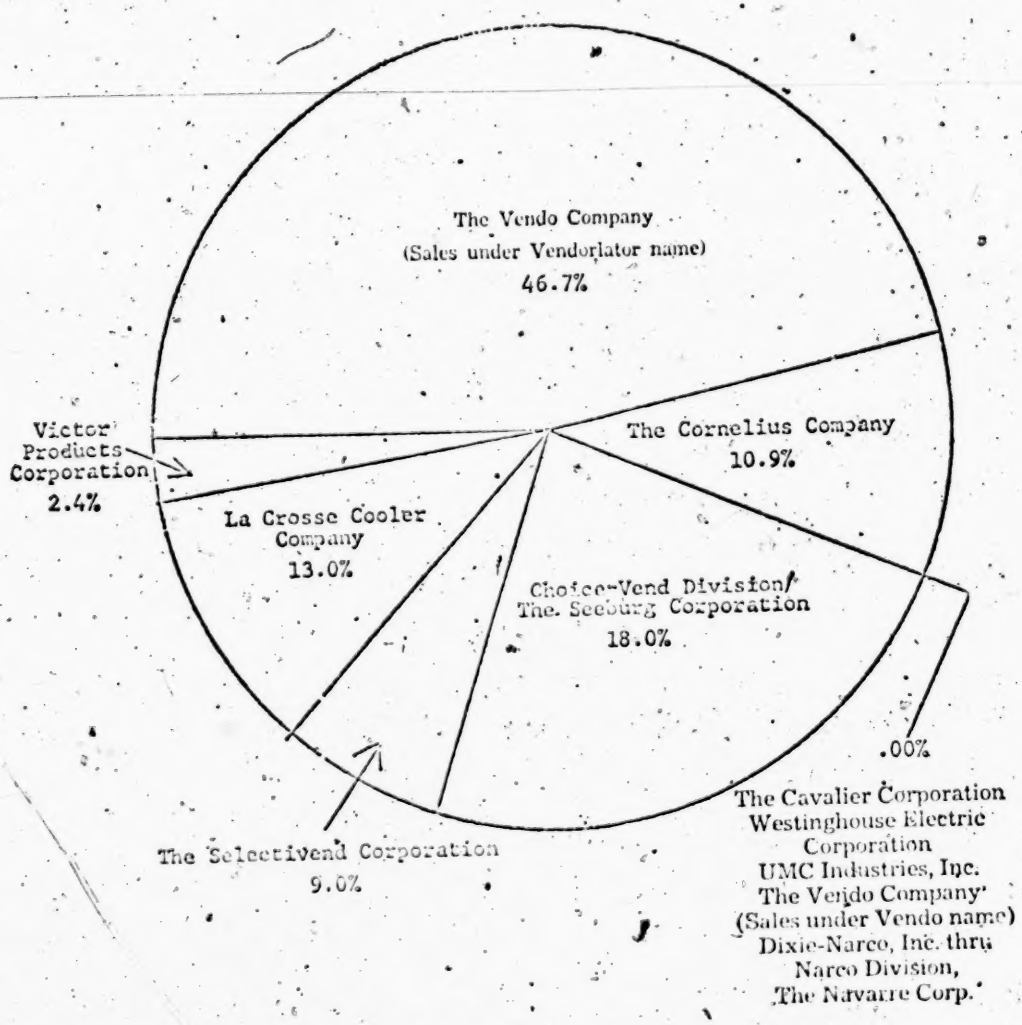
85. At the time of the challenged acquisition in 1963, "trade" bottlers, such as bottlers of "Pepsi-Cola, Royal Crown, Canada Dry, 7-Up and Dr. Pepper" (Miller, Tr. 1986), generally purchased their soft drink vending equipment from those manufacturers who worked closely with "trade" bottler parent syrup companies to secure approval of such equipment (Small, Tr. 1295, 1299; RX 418; Ebner, Tr. 1759-60; Teeter, Tr. 1797; RX 137 A-B, 422 A-B, 119, 105, 430 A-B, 429).

86. At the time of the challenged acquisition in 1963, "trade" bottlers were supplied their vending equipment by the following manufacturers: LaCrosse Cooler Company (Ebner, Tr. 1733); Selectivend, Inc. (Teeter, Tr. 1780-81); Victor Products Corporation (Hockman, Tr. 775; Small, Tr. 1295); Vendorlator Division of The Vendo Company (Burlington, Tr. 1520-21; Selzer, Tr. 1546-47); and the Choice-Vend Division of The Seeburg Corporation (Miller, Tr. 1986).

87. The following charts, Respondent's Exhibits 478 and 479, reflect sales of coin-operated bottle vending machines as a percentage of stipulated sales of such machines to "trade" bottlers on a unit and dollar basis in 1963, the year of the challenged acquisition:

RESPONDENT'S EXHIBIT 478

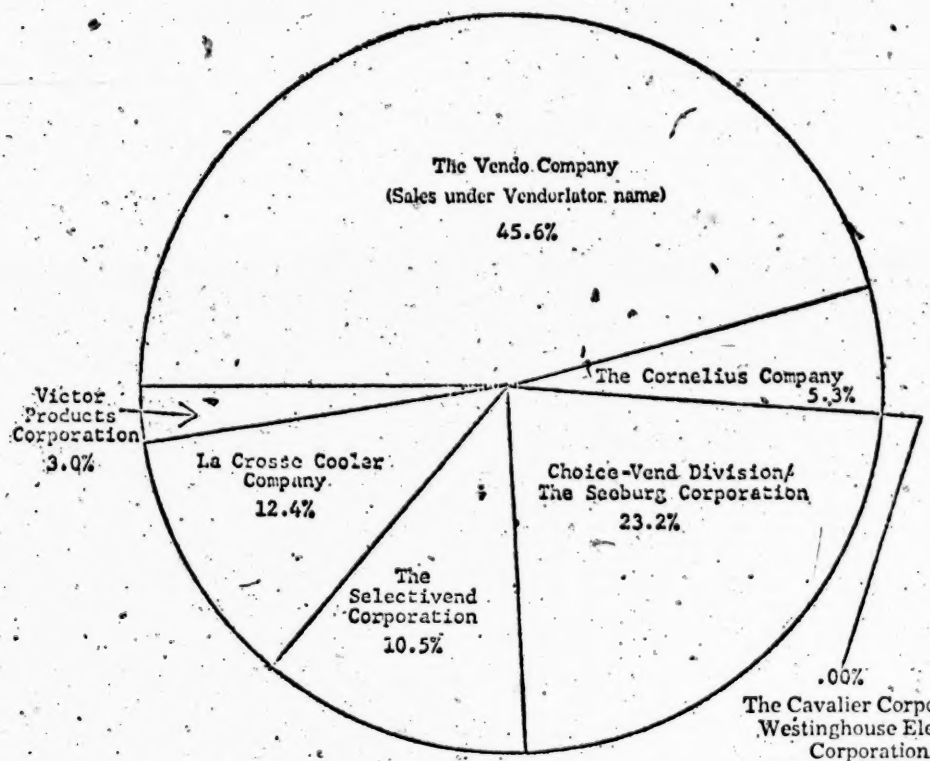
SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN UNITS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO TRADE BOTTLERS (e.g. PEPSI COLA, ROYAL CROWN, ETC.)
FOR 1963



Source:
CX 247
RX 417

RESPONDENT'S EXHIBIT 479

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN DOLLARS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO TRADE BOTTLERS (e.g. PEPSI COLA, ROYAL CROWN, ETC.)
FOR 1963



Source:
CX 247
RX 417

88. At the time of the challenged acquisition in 1963, the approved suppliers of Coca-Cola bottle and can vending machines (e.g., Vendo, under the Vendo name, Cavalier, Westinghouse) did not solicit "trade" bottlers and, in fact, made no sales to this class of equipment purchasers (e.g., Graham, Tr. 1946-47; Brinkmann, Tr. 1702-03; Donahue, Tr. 1429; Selzer, Tr. 1546-49; Steeley, Tr. 1843; CX 247; RX 417, 478-79). These suppliers solicited Coca-Cola bottlers on an exclusive basis. The only exception involved Cornelius, which was an approved supplier of horizontal bottle vendors to both Coca-Cola and "trade" bottlers. (See Findings No. 65-70, 77-78.)

89. Cornelius was able to straddle both markets because its machine was unique and filled "a specific need" in that it was suitable for placement at locations which were not otherwise economically served by ordinary upright bottle and can vending machines. (RX 162, 173 A-B).

c-3. *Vendo's Ability To Serve Both Coca-Cola and "Trade" Bottlers*

90. Vendo, which prior to 1956 had been an exclusive supplier of bottle vending equipment to Coca-Cola bottlers, was able to serve the "trade" bottler segment of the vending industry after its acquisition of the Vendorlator Company in 1956 (Burlington, Tr. 1518; Selzer, Tr. 1546-49; CX 65, pp. 7-8; RX 315, 316 A-D, 318 A-D).

91. Subsequent to Vendo's acquisition of Vendorlator, a "misunderstanding" developed between Vendo and the Coca-Cola bottlers, who had preferred Vendo as an exclusive supplier of Coca-Cola machines. The "misunderstanding" was caused by the confusion "that arose from the overlapping of our product lines and the differences in our policies" (RX 316 C). Vendo advised Coca-Cola bottlers that it would continue its exclusive and distinctive line of machines for Coca-Cola bottlers, would no longer

sell the same machines through Vendorlator to "trade" bottlers that it was selling to Coca-Cola bottlers, and would continue to maintain its separate sales force calling exclusively on Coca-Cola bottlers as it always had in the past (RX 316 C-D). Vendo also emphasized the importance of making Coca-Cola bottlers realize that Vendorlator and Vendo machines will be "completely different . . . in exterior appearance" as well as price-wise (RX 318 C).

92. In addition to giving Vendo entry into the "trade" bottler segment of the vending industry, stipulated sales data demonstrate the importance of the Vendorlator acquisition to Vendo. For example, at the time of the challenged acquisition in 1963, sales of bottle and can vending machines sold under the Vendorlator name accounted for 59.7% of all such sales on a unit basis and 57.3% of all such sales on a dollar basis made by Vendo (RX 472). These sales accounted for 34.8% of all coin-operated vending machines sold by Vendo on a unit basis and 25.1% of such sales on a dollar basis in that year (RX 472).

93. Even though Vendo was thus able to serve both the Coca-Cola and "trade" bottler segments of the vending industry at the time of the challenged acquisition, it did so through separate "specialized sales forces" which sold differently styled equipment under separate trade names (Vendo and Vendorlator) (Burlington, Tr. 1518-21; Selzer, Tr. 1546-49; Hansen, Tr. 1566-69). John L. Burlington, Vice President of Sales and Marketing for Vendo, testified that neither the Vendo nor Vendorlator "specialized sales forces" solicited the other's customers, a long standing policy which Vendo considered necessary (Burlington, Tr. 1518-21; Selzer, Tr. 1546-49; RX 450 C, 313, 316 C-D, 318 A-D).

94. Even in the case of "cross-franchises", where a Coca-Cola bottler may "also have a Seven-Up franchise", Vendo would still have "specialized coverage" with "two

men", one from each "specialized sales force" "calling on that account" (Burlington, Tr. 1520, 1528-29).

95. At the time of the challenged acquisition in 1963, the Vendorlator Division of The Vendo Company was the largest supplier of bottle vending machines to the "trade" bottler segment of the vending industry. According to the stipulated sales data for 1963, sales of coin-operated bottle vending machines to "trade" bottlers under the Vendorlator name amounted to 46.7% of all such sales on a unit basis and 45.6% on a dollar basis (RX 478-479).

96. At the same time, Vendo was one of the three major approved suppliers of soft drink vending equipment to Coca-Cola bottlers, to whom it supplied an exclusive line of equipment under the Vendo name, and accounted for 27.4% of stipulated dollar sales of bottle machines to those bottlers (RX 475), and 26.5% of such sales on a unit basis in 1963 (RX 474).

V. Trends and Developments in the Vending Industry

A. *Growth and Diversification in the Vending Industry*

97. Since the end of World War II, the vending industry has grown dramatically, with sales of products through vending machines rising from approximately $600 million in 1946 to $3.8 billion in 1965 (CX 64; RX 421 A).

98. This growth has been accompanied by rapidly improved technology, with a marketing transformation changing the image of the industry from simple penny machines, vending nuts and gum, to modern "banks" of sophisticated equipment vending a full range of foods and drinks catering to the needs and appetites of today's affluent consumer (Donahue, Tr. 1418-21; Swingler, Tr. 1622; CX 62, pp. 5, 10-11; 63, pp. 5, 10-11; 64, pp. 12-13; RX 421 E; 443, pp. 4-5, 7-8, 10; 444, pp. 2-5; 463, pp. 6-9; 459, pp. 7-8; 457, pp. 5-8).

99. As Thomas B. Donahue, Vice Chairman of the Board of UMC Industries, Inc., testified on direct examination by complaint counsel, prior to World War II the vending industry first "got started with little postage vendors and chewing gum and small candy bar vendors" (Tr. 1418). Thereafter, a series of developments produced cigarette vending machines, a type of soft drink bottle vending machine, and candy machines (Donahue, Tr. 1419). Then came World War II which acted as a "crystallization" period. "In other words, many people, especially the young men, were introduced to vending machines for the first time. In addition to that, it became apparent that many machines could do a job in the defense plants and in the shipyards where they served candy and cigarettes and cokes and began to perform services that were recognized as being essential, if you want to call it that, to the daily well being of the employees" (Donahue, Tr. 1420). "Then the industry began to expand. By that, I mean there was a much greater interest in vending other products, because the handwriting became apparent after a few years that we were going to be able to automatically feed people" (Donahue, Tr. 1421).

100. In addition to "vertical growth" of sales, the vending industry has also experienced a "lateral expansion as vending has moved into new fields of activity. Food vending, in particular, has opened up established markets to vastly greater sales opportunities, while at the same time creating new outlets never before accessible to the industry. High school students now buy noon time meals from batteries of automatic equipment; doctors and nurses and other staff people patronize hospital installations on a round-the-clock basis; visitors at parks and recreation spots find more and more products available through coin-operated equipment.

"Ever-increasing replacement markets, plus the new markets which are expanding the industry's scope of op-

erations, give every indication vending will continue to grow in the years ahead" (CX 62, p. 5).

101. This "lateral expansion" of the industry in terms of new outlets and new products has in turn generated a demand for vending equipment compatible with the "full-line vending" concept.

102. Richard J. Mueller, Vice President of Rowe Manufacturing Division of Canteen Corporation, the country's largest vending operator, testified that "the term 'full-line' is usually interpreted to mean to be able to put in a bank of vending equipment of various types in a row which are more or less compatable (sic) with each other for—from the selling standpoint" and which will sell all of the products available for distribution through a vending machine, including "cold drinks, coffee, candy, sandwiches, pastry, cigarettes, [and] hot canned food" (Mueller, Tr. 1677; Salzer, Tr. 1554).

103. According to William F. Swingler, Vice President of Canteen, the types of machines usually involved in a full-line vending operation include, among others, candy, beverage, coffee, milk, ice cream, soup, hot canned food, and general merchandiser vending machines (Swingler, Tr. 1638). Though these machines are also sold as individual units, "the operator will bank these machines together—" so that "they all blend together, just as one unit" (Ibid.). These "banks" of vending machines are "the same height [and] the same color" (Ibid.).

B. *Vending Operating Companies in Full-Line Vending*

104. At the time of the challenged acquisition in 1963, vending operating companies were fully engaged in full-line vending and were purchasing a wide variety of vending machines, including machines which dispense hot and cold beverages, hot and cold foods, sandwiches, pastry,

coffee, ice cream and cold drinks to place "in a bank or multiple group" (Funkhouser Tr. 1345) in such diverse locations as cafeterias and industrial plants, offices, hospitals, colleges and department stores (Burlington, Tr. 1494, 1499-1500; Funkhouser, Tr. 1345; Swingler, Tr. 1620-21, 1628-29, 1631-33; RX 443, pp. 4, 7, 10; 444, pp. 2, 4; 446, pp. 6-9, 19-20; 459, pp. 7-10). Recently, improved technology has enabled the development of a combination of vending machines and manual service to take place in the distribution of foods, thus permitting vending operators to expand into many new locations which engage in mass feeding (Swingler, Tr. 1628-30; RX 443, pp. 8-9; 444, p. 3; 446, pp. 5, 19; 459, p. 7; 421 B).

105. Vending operating companies have been increasingly purchasing canned soft drink vending machines for utilization in their operations and in their "banks" of equipment placed in various locations, finding this disposable container more amenable to their operations than bottles (Hockman, Tr. 789-90; Small, Tr. 1270; Selzer, Tr. 1546; Brinkmann, Tr. 1704-05, 1708-09, 1712; Jordan, Tr. 2028).

106. Vending operating companies are making increasing use of diversified banks of vending equipment in a variety of locations in order to satisfy changing consumer demands, and to accomplish their aim of providing complete vending and food service to their established and newly emerging customer markets (Swingler, Tr. 1620-21, 1628-33, 1635, 1637-38; RX 459, p. 7; 490, pp. 4, 8, 10; 446, p. 5).

C. *Soft Drink Bottlers Diversifying Into Full-Line Vending*

107. In addition to their bottle and can vending operations, both prior to and since the challenged acquisition in 1963, soft drink bottling firms were and are increas-

ingly diversifying into full-line vending in order to satisfy changing consumer demand, and to protect their market position at locations where their soft drink products are being vended. William E. Swingler, Vice President of Canteen, testified that soft drink bottlers had entered the full-line vending area and that this development "has been very active in the last ten years" (Swingler, Tr. 1638). Mr. Swingler further testified that full-line vending is a "growth segment" of the bottler business and that soft drink bottlers seek to place their vending machines in the same locations as vending operators (Tr. 1639). In addition, Mr. Coleman, Chairman of the Board of Seeburg, testified on direct examination by the complaint counsel that there was an "increasing trend" of bottlers moving into full-line vending with "more bottlers moving into the industry full line every day" (Tr. 2112-15; see also Mueller, Tr. 1678-79; Swingler, Tr. 1638; Brinkmann, Tr. 1718). When a soft drink bottler entered into full-line vending, he would provide the same services as an operating company at the same or similar locations (Swingler, Tr. 1639; Adair, Tr. 2137).

Coca-Cola Bottler Activity in Full-Line Vending Operations

108. In addition to being the largest group of soft drink bottlers, and being the largest purchasers as a class of bottle and can vending machines for soft drink vending operations, Coca-Cola bottlers were rapidly moving into full-line vending at the time of the challenged acquisition. (Coleman, Tr. 2105, 2112-15; Raoul, Tr. 2084; Brinkmann, Tr. 1718; RX 390 A).

109. Coca-Cola bottlers were particularly active in developing this new segment of bottler operations. As Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, testified on direct examination by complaint counsel, many Coca-Cola bottlers "were moving into full-

line vending because here the institutions, plants, schools, and so forth, didn't want to deal with Coca-Cola bottlers for one thing and somebody else for a coffee machine and somebody else for cigarette machines and somebody else for something else. They wanted one responsible person to come in and put in all the equipment. So you had a natural evolution of Coca-Cola bottlers to full-line vending" (Tr. 2105).

110. Mr. Coleman further testified that the Coca-Cola bottlers' activity in the area of full-line vending was encouraged and spurred on by The Coca-Cola Company, which was "very aggressive" in this field (Tr. 2114). He testified that The Coca-Cola Company recognized the necessity "to get Coca-Cola in all places" where a full-line of machines was being installed. If Coca-Cola were to "reply on a third-party operator, the parent company wouldn't know whether Coca-Cola was being vended in that plant or Pepsi-Cola or Seven-Up or anything else. They [Coca-Cola] weren't altruistic about selling coffee and milk, it was just an adjunct to sell Coca-Cola" (Tr. 2114).

111. By November 1961, 115 Coca-Cola bottlers were purchasing full-line vending equipment from Vendo, up from 42 in 1959 (RX 390 A). This represented some 12.8% of all Coca-Cola bottlers (on the basis of 900 Coca-Cola bottlers in the United States) as early as 1961 (RX 390 A). Sales of general products by Vendo to Coca-Cola bottlers amounted to $2,256,000 during January-November 1961, 12.4% of all Vendo general products sales to all customers (RX 390 A). In June 1961, The Vendo Company recognized a "very decided increase of interest with many of the Coca-Cola bottlers towards full-line vending" (RX 389 A) and concluded "if trends indicated by this information continue, bottlers of Coca-Cola should become increasingly important as customers for" vending machine

products other than bottle and can vending equipment (RX 390 A).

112. Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, testified on direct examination by complaint counsel that at the time of the acquisition, "There was just one of our major competitors who sold Coca-Cola a full line and that was Vendo" (Tr. 2106).

D. *Development of National Users Vending Machine Programs*

113. A new and important marketing dimension in the vending industry came with the emergence in the early 1960s of a so-called National Users market. In this market, large national accounts, such as the major oil companies, primarily engaged in businesses other than vending, purchase diversified "banks" of vending equipment for placement at various locations (Coleman, Tr. 2099-2100, 2106-07; Raoul, Tr. 2078-84; Brinkmann, Tr. 1718-21; RX 388 A-C, 219 A-F, 450 A-F, 434 D, 393 A-O, 399).[8]

114. The National Users development resulted in "a new channel of distribution for vending equipment" (RX 450 E, 487 L). The operation of this new distribution channel may be illustrated by describing the processes through which vending machines are placed on location in service stations. Before the National Users system developed, neither service stations nor their parent companies dealt with vending machine manufacturers. Vending machine manufacturers sold their soft drink machines directly to soft drink bottlers, who placed them on loca-

[8] Although much of the attention in this developing market has been focused on the large national and regional oil companies, business prospects are not confined only to service stations as they "are only one part of what is a very large field and there's many other possible branches", such as retail food store chains (Raoul, Tr. 2081; Brinkmann, Tr. 1719; Coleman, Tr. 2105; RX 434 D).

tion with service station dealers. Similarly, the service stations' requirements for "full line" equipment (all coin-operated vending machines except those designed to dispense bottled and canned soft drinks) were satisfied not by the vending machine manufacturers directly, but primarily by local vending machine operators, who placed such machines on location in the service stations and furnished the product and mechanical service as needed. Frequently, these operators placed used vending equipment at the service stations which resulted in these locations being cluttered "with a hodge-podge of old equipment that detracts from the general appearance of the stations and reduces the appeal for the products being vended" (RX 450 F).

115. The National Users programs made it possible for national companies to purchase "uniform banks of vending equipment" directly from the vending machine manufacturer for placement in their filling stations or other locations, "with color schemes customized to the National Users' specification" (RX 450 A, 487 L).

116. At the time of the Seeburg acquisition of Cavalier in 1963, soft drink bottlers participated in the parent syrup companies' National Users programs in order to protect their markets in a changing vending industry (RX 434 D, 450 E-F, 487 L-M).

117. Soft drink bottlers do not technically sell vending equipment to National Users, but cooperate in such programs by providing necessary services, such as uncrating, checking out and installing equipment, and mechanical services as needed, in the hope of having their soft drink products vended through the bottle or can vending equipment placed at the National Users' locations (RX 434 D, 450 E-F, 487 L-M). As George M. Lawson, Vice President of The Coca-Cola Company explained Coca-Cola's National Cooler Users Program, "[t]he equipment is shipped

to the local bottler who uncrates it, tests it and delivers it to the chain. The bottler hopes through this service to enlist the good will of the national user and to sell him product (sic) to be vended through the equipment", although on occasion, the bottler, and not representatives of the manufacturer, may actually "solicit the business and deliver coolers from his own inventory to the chain, either billing the manufacturer for the cooler delivered, or obtaining replacement thereof from the manufacturer" (RX 434 D).

118. Thus, "[a] service station dealer who wishes to install a bank of vending machines under the National User Program will contact the office of the oil company that supplies him with his petroleum products. He advises the oil company of the types of vending machines that he desires and the local bottler with whom he has arranged for mechanical service. The oil company places the order with the vending machine manufacturer. The machines are painted to the color specifications of the oil company, the bottle vender is equipped with a sign bearing the trademark of the cooperating bottler, and all equipment is shipped to the local bottler. The bottler uncrates, checks out the equipment and installs it in the service station. The service station dealer obtains supplies from local wholesalers, fills the equipment and collects all revenue from the sale of the products. The vending machine manufacturer bills the oil company direct for the equipment and payment for the equipment is remitted by the service-station dealer to the oil company on a monthly basis" (RX 450 F).

119. Basically, the sales effort in the National Users market is carried on at the oil chain headquarters, where representatives from the vending machine manufacturers and parent syrup companies call on Users to acquaint them with the program and the availability of equipment (Selzer, Tr. 1558; RX 450 F, 388 A-C).

120. The machines most frequently used in the National Users market consist of a "bank" of soft drink (bottle, can or bottle/can), candy, cigarette and coffee machines, or any combination thereof which meets the needs of a particular location. According to evidence received without objection from complaint counsel, in order to "compete successfully for this business, the vending machine manufacturers must have a complete line of equipment, including bottles, candy, cigarette and coffee vendors" (RX 450 A; Raoul, Tr. 2083 84; Brinkmann, Tr. 1720 22).

121. Thus, under the National Users programs, as with the full-line vending concept, manufacturers need matched banks of vending equipment to serve the changing market's needs.

122. An additional requirement for the National Users business is the necessity "that the manufacturer have a working relationship with all bottlers in every community, because the cooperating bottler is selected by the service station operator, and if the operator chooses a bottler who does not do business with a given manufacturer, the manufacturer is prohibited from placing equipment in that location" (RX 450 A).

Coca-Cola and Coca-Cola Bottler Activity in the National Users Market

123. The Coca-Cola Company was particularly active in the development of this National Users market. Coca-Cola was the soft drink most frequently demanded by oil company customers in this segment of the market (RX 388 B; Tr. 2107). Coca-Cola people and Coca-Cola bottlers were aggressively selling these National Users, and in the service stations "they wanted Coca-Cola" (Coleman, Tr. 2107). As Charles H. Brinkmann, formerly in charge of Westinghouse Electric Corporation's Automatic Merchandising Division, testified, "he knew" the

Coca-Cola Company in Atlanta, Georgia "to be most active in this field" (Tr. 1720).

124. William G. Raoul, who was President of Cavalier Corporation and is now President of the Cavalier Division of The Seeburg Corporation, testified on direct examination by complaint counsel that he had first become aware of the "National Users Plan of The Coca-Cola Company" at a meeting with Coca-Cola in Atlanta "about five years ago", i.e., 1962, although "it could have been longer than that" (Tr. 2078). Mr. Raoul further testified that this meeting was "[a] long time before the acquisition" (Tr. 2079). Coca-Cola "explained to us what the National Users Market was and what Coca-Cola's basic policy towards it would be; because it affected us as suppliers. It also affected the bottlers" (Tr. 2079). "The problem of selling accounts to transcend the normal territorial limits of the contract bottlers. And the Coca-Cola plan for doing it" was explained (Raoul, Tr. 2079). Coca-Cola "had a Department for that purpose several years ago and have been working on it consistently ever since" (Raoul, Tr. 2079).

125. Coca-Cola's interest in the National Users market was outlined in a letter from Sam N. Gardner, Vice President of Bottler Sales Promotion for The Coca-Cola Company, to Mr. John T. Pierson, Jr. of The Vendo Company, on November 4, 1963, summarizing the "conclusions and viewpoints expressed" at a meeting between Coca-Cola and Vendo officials held to discuss the changing nature of the vending industry in this regard. Mr. Gardner acknowledged "the recent trend toward multiple vending in service stations", and the "increasing tendency toward centralized buying of unitized vending batteries at chain headquarters level" (RX 388 A). He also recognized "the vital importance of this market to the Coca-Cola bottlers", and expressed concern about protecting the bottlers' interest, which could only be done "through a

cooperative effort between the Bottlers, the Company, and the vendor manufacturer soliciting business at headquarters level" (RX 388 A). Accordingly, Mr. Gardner indicated Coca-Cola's "intention to support the efforts of The Vendo Company—and other approved manufacturers—to sell unitized vendor batteries to the oil chains as a means of protecting the existing position established by the Bottlers" (RX 388 A). Furthermore, Mr. Gardner noted the active efforts Coca-Cola would take to protect the interest of its bottlers by contacting these national chains in an effort to "sell the chain on the advantages of working with the Coca-Cola Bottlers" (RX 388 A).

126. Mr. Gardner also stated that "[i]n view of the long-term relationship between Vendo", Coca-Cola Company and Coca-Cola bottlers, Vendo "should make every effort to support the sales efforts of the Coca-Cola representative" in this new segment of the vending industry (RX 388 B). The "importance of this support" was stated to be "enhanced by the existing prestige status of Coca-Cola in the market, the greater consumer preference, plus the fact that the Coca-Cola Bottler can usually provide the best mechanical service in town" (RX 388 B).

127. Recognizing that "from the viewpoint of the Bottler, a direct sales approach to the chain represents a new departure from the long-established policy of selling coolers only to the Bottler," Coca-Cola promised to "support" Vendo's "maintenance of satisfactory customer relations by endeavoring to create a clear understanding throughout the industry of this change in policy, its necessity, and the plus values that should accrue to the Bottler" (RX 388 B).

128. Since the equipment under the National Users program would not be sold by the bottler, but rather directly from the manufacturer, Coca-Cola undertook the responsibility to "attempt to sell the chain on the ad-

vantages of working with Coca-Cola Bottlers" (RX 388 A). Coca-Cola actively took steps "to insure that Coca-Cola is represented" in the National Users sales picture, and made arrangements to assure participation by Coca-Cola bottlers in this new enterprise and to protect their interest (RX 219 A-C, 388 A-C).

129. In connection with the sale of "unitized batteries" to National Users, Mr. Gardner advised Vendo that Coca-Cola "will authorize the use of script trade-mark on Coca-Cola coolers" in such batteries "on request from you" (RX 388 B).

130. Coca-Cola's permission to approved vending machine manufacturers to utilize its script trade-mark on Coca-Cola coolers was made necessary since "as more companies—including oil chains—have become engaged in full-line or diversified vending, it has been important to set up approved cooler manufacturers to sell directly to such accounts", as they "find it necessary to make national contacts and sales" "in order to meet their own competition within the vending machine manufacturing industry" (RX 219 B).

131. Prior to the Seeburg acquisition of Cavalier in 1963, The Vendo Company was the only major approved supplier of bottle and can vending machines to Coca-Cola bottlers in a position to supply a complete line of other equipment under the National Users program. At that time Vendo sold the coffee, cigarette and candy machines used in conjunction with Coca-Cola approved bottle and can vending equipment in the National Users market (RX 457, pp. 18-19; RX 450 *X*). Charles H. Brinkmann, the General Manager of Westinghouse Electric Corporation's Automatic Merchandising Division, testified that the company "doing the most of" selling in this area "was The Vendo Company" (Brinkmann, Tr. 1719). As a result, Vendo had the Coca-Cola National Users business vir-

tually "locked up" (Raoul, Tr. 2080; Coleman, Tr. 2106-07).

E. *Broadening and Diversification of Vending Machine Manufacturers' Line of Vending Equipment in Order To Satisfy Their Customers' Changing Requirements*

132. As heretofore indicated, the requirements of the vending industry rapidly moved in the direction of full-line vending, and National Users began to directly purchase "banks" of vending equipment, vending equipment manufacturers found it necessary to broaden and diversify their line of machines in order to satisfy these changing consumer demands. As Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, testified on direct examination by complaint counsel, "[i]f you handle the meat, you've got to handle the peas and fruit, ... This became our problem . . . . There were no operators that were just operating one machine by itself. This is what began to happen in the field. In order to get competitive and compete, we found that we had to have a fuller line so as to satisfy the customer's requirements. Obviously, if we didn't have a coffee machine we might not sell them the cold drink vending machine" (Tr. 2092).

133. The importance of a full line of machines by the manufacturer was underscored by William F. Swingler, Vice President of Canteen, the largest vending operating company in the United States, who testified that Canteen rarely uses alternate machines manufactured by different corporations when placing a bank of coin-operated vending machines (Tr. 1635).

134. Vending machine manufacturers were constantly seeking to augment their product line in order to remain competitive in a changing market.

135. Vendo early recognized the trend toward diversification in the vending industry, and "[s]ince World War II", approximately 15 years before Seeburg entered the

vending industry, "it has been the policy of Vendo to expand its product line to achieve diversification and a broader base for expansion" (CX 65, p. 7).

136. Diversification was the purpose of Vendo's acquisition of Vendorlator, a large manufacturer of bottle vending equipment, in 1956. According to E. F. Pierson, Chairman of the Board of The Vendo Company in 1956, Vendo's acquisition of Vendorlator was dictated by "[t]he demands of growth and expansion . . ." (RX 315). Also, Thomas A. Buckley, Vice President of Sales and Marketing of The Vendo Company in 1956, advised all Coca-Cola bottlers that "the expanding markets for automatic merchandising equipment had already forced us to embark on a plan of extensive diversification of our product line and this affiliation was but a further step in this direction" (RX 316 D).

137. The Vendorlator acquisition, pursuant to a program of diversification, enabled Vendo to make "use of combined production facilities as the demand for food vending equipment is added to beverage machines" (RX 315; CX 65, pp. 7-8).

138. In 1957, the Federal Trade Commission entered into a consent disposition with The Vendo Company regarding its acquisition of Vendorlator, which permitted Vendo to retain the Vendorlator operations, while requiring it to make available to competitors certain of the patents it acquired (*In the Matter of The Vendo Company*, 54 F.T.C. 253 (1957)).

139. As early as 1961, The Vendo Company manufactured "the most complete line of vending equipment of any manufacturer in the industry", including "venders for fresh brew coffee, . . . ; automatic coin-operated dispensers for milk, fruit juices, fruit, ice cream, cookies and nuts, and versatile Visi-Vend line that can accommodate virtually any product—hot, cold, or frozen—than (sic) can be packaged for vending" (RX 457, p. 18). In addition,

Vendo produced "an entire line of beverage vending equipment sold exclusively to the bottlers of Coca-Cola", including "both cup and bottle venders", and its "Vendorlator division" made vending equipment "for the carbonated beverage industry—Pepsi-Cola, 7-Up, Nehi, Royal Crown—and other 'trade' bottlers" (RX 457, p. 19).

140. Prior to Seeburg's acquisition of Cavalier in 1963, The Vendo Company was the largest and dominant manufacturer of coin-operated vending equipment in the United States, and was the only full-line supplier of vending machines to all customers in the vending industry (Brinkmann, Tr. 1722; Coleman, Tr. 2106; Selzer, Tr. 1554; CX 226; 65, pp. 7-9, 11; RX 468; 457, pp. 18-19; 454, pp. 19-22).

141. According to the stipulated sales data, in 1963, Vendo's sales of coin-operated vending machines amounted to 24.2% of all such sales on a dollar basis ($39,547,470) (CX 226) and 13.6% of such sales on a unit basis (82,248 units) (RX 468), almost twice as large as its nearest competitor.

142. Also, in 1963, Vendo was the dominant factor in the "trade" bottler segment of the vending industry, which it served separately under the Vendorlator name, with 45.6% of the dollar value of all bottle vending machines sold to that class of customers ($9,572,137) (RX 479, 417), and 46.7% of such sales on a unit basis (27,961 units) (RX 478, 417).

143. At the same time, Vendo was one of the three major approved suppliers of soft drink vending equipment to Coca-Cola bottlers, to whom it supplied an exclusive line of equipment under the Vendo name, and accounted for 27.4% of stipulated dollar sales of bottle machines to this class of customers ($7,133,163) (RX 475, 417), and 26.5% of such sales on a unit basis in 1963 (18,875 units) (RX 474, 417).

144. In addition to Vendo, other major manufacturers of vending equipment were also developing a full line of vending equipment prior to the challenged acquisition. For example, Canteen Corporation, the largest vending "operator" in the United States, was permitted to acquire and retain Rowe Manufacturing Company as a result of a Federal Trade Commission consent settlement in 1958 (*Automatic Canteen Co.*, 54 F.T.C. 1831 (1958)). In 1962, Canteen introduced its "Celebrity Line" of vending equipment, developed for "extended-line" or full-line vending, which included machines for hot and cold drinks, sandwiches, candy, pastry, hot foods, salads and desserts, cigarettes and the like (RX 454, pp. 9-14). According to the record evidence, "[t]his equipment is modular in design and each vending machine is matched and engineered so that all seven of the basic types of machines can be placed in a continuous bank in any multiple or combination to look substantially as a single unit" (RX 463, p. 6). From a marketing standpoint, the availability of matched panels and banks of machines is desirable (Mueller, Tr. 1680-81).

145. According to stipulated sales data, prior to the Seeburg acquisition of Cavalier in 1963, Canteen was the third largest manufacturer of vending equipment in the United States with 12.3% of all coin-operated vending machines sold on a dollar basis ($20,095,378) and 5.5% of such sales on a unit basis (33,393) (CX 226; RX 468).

146. Similarly, National Vendors, a subsidiary of the large and diversified Universal Match Corporation (today UMC Industries, Inc.), which was "the world's leading producer of cigaret and candy vendors", "emphasized development of a 'full line' of vending machines" in 1962 and indicated it would continue that as its "primary objective" in 1963 (CX 67, p. 4).

147. According to stipulated sales data, UMC ranked second in the manufacture and sale of coin-operated vending machines on a unit basis (46,123 units; 7.6% of such

sales) and fourth on a dollar basis ($18,518,565; 11.3% of such sales) in 1963 (CX 226; RX 468).

148. Seeburg did not enter the vending industry until 1958, when it acquired the "bankrupt" Eastern Electric Company Inc.'s cigarette machine (Coleman, Tr. 2087). Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, explained Seeburg's entry into the vending industry on direct examination by complaint counsel as follows:

> "Well, we were manufacturers of coin-operated phonographs which are commonly called 'juke boxes'. And it was our experience that these juke boxes normally go into bars, grills, taverns, diners, and so forth. And normally in that very same location you would find a cigarette machine. And we felt that this would be an opportunity for our present distributor force to have an opportunity to sell cigarette machines since basically the same locations were using them as were using our coin operated phonographs" (Coleman, Tr. 2087-88).

149. Seeburg expanded its line of vending equipment as part of a program of diversification since, "[i]n order to get competitive and compete, we found that we had to have a fuller line so as to satisfy the customer's requirements" (Coleman, Tr. 2092).

150. At the time of the Seeburg acquisition of Cavalier in 1963, Seeburg manufactured several different types of vending equipment. Its line was principally devoted to post-mix cup, cigarette and coffee machines, as well as bottle and can equipment for "trade" bottlers (Coleman, Tr. 2086-95, 2096-97; CX 247, pp. 1-2; RX 466 A, 467, 478, 479, 417, pp. 1-3). It did not then, and does not now, manufacture machines designed to dispense various food products, e.g., an all purpose food merchandiser, which is essential to serve customer needs in the rapidly develop-

ing vending markets today (Adair, Tr. 2122-23; RX 466 A, 467, 457, pp. 5-8, 463, pp. 6-7).

151. At the time of the challenged acquisition in 1963, Seeburg reported 13.8% of all sales of coin-operated vending machines on a dollar basis ($22,575,000) and 4.5% of such sales on a unit basis (27,115 units) (CX 226; RX 468).

152. Subsequent to the challenged acquisition, Westinghouse Electric Corporation's Automatic Merchandising Division also began manufacturing a range of full-line vending equipment. It introduced a "cup-drink vending machine with ice" (a post-mix type), and "a fresh brew coffee machine" (single cup) in 1965, "a candy machine" late in 1965 or early in 1966, and in the latter part of 1966 "a tandem candy machine which was used only to vend cans" (Brinkmann, Tr. 1702-03). At the time of the acquisition in 1963, Westinghouse was one of the major approved suppliers of vending machines to Coca-Cola bottlers and manufactured only convertible bottle/can vending machines for sale to those bottlers (Brinkmann, Tr. 1702, 1704). As Charles H. Brinkmann, then General Manager of Westinghouse's Automatic Merchandising Division, testified, Coca-Cola bottlers were engaged in full-line vending, and it was on the "increase" (Tr. 1718).

VI. The Seeburg Acquisition of Cavalier in 1963

A. *Description of the Acquiring and Acquired Corporations as of 1963*

1. Acquiring Corporation (Seeburg)

153. At the time of the challenged acquisition in 1963, Seeburg, directly or through its subsidiaries, was principally engaged in the manufacture and sale of coin-operated phonographs, various types of coin-operated vending machines, hearing aids and musical instruments (CX 9, pp. 4, 14; 10, pp. 1-2).

154. So far as pertinent to the instant proceeding, Seeburg entered the vending machine manufacturing industry in 1958 when it acquired the "bankrupt" Eastern Electric Company, Inc.'s cigarette machine and, as of 1963, manufactured and sold the following types of coin-operated vending machines: cigarette machine; batch brew coffee machine; cup vending machine; bottle and can vending machines; single-cup coffee machine; and a nonfood all purpose merchandiser (Coleman, Tr. 2086-98; CX 9, pp. 4, 14; 10, pp. 1-2; 11, pp. 8-9).

155. At the time of the acquisition, Seeburg, through its Choice-Vend Division, was an approved supplier of bottle and can vending machines only to "trade" bottlers, and its sales force did not solicit Coca-Cola bottlers for their bottle and can vending machine business (Miller, Tr. 1986-87, 1992-99).

2. Acquired Corporation (Cavalier)

156. At the time of the challenged acquisition in 1963, Cavalier was engaged in the manufacture and sale of only bottle and bottle/can vending machines to a single class of customers, the company owned and contract bottlers of Coca-Cola. Cavalier was an approved supplier of these machines, and did not solicit or sell such machines to "trade" bottlers (Findings No. 19, 77, 80).

B. *Background and Circumstances of the Challenged Acquisition*

1. Considerations Prompting Seeburg's Acquisition of Cavalier

157. As Delbert W. Coleman, Chairman of the Board of Seeburg, testified on direct examination by complaint counsel concerning the major considerations which prompted Seeburg's acquisition of Cavalier in 1963: since "Coca-Cola represented a very large segment of the bottle-vending

industry" (Tr. 2105) and Seeburg wasn't "an approved source of supply" of bottle and can vending machines to Coca-Cola bottlers, Seeburg bought Cavalier to diversify into the Coca-Cola segment of the vending industry "because we were selling Coca-Cola very little merchandise at that time" (Tr. 2107).

158. The challenged acquisition in 1963 took place only after many years of fruitless effort by Choice-Vend Corporation, since 1960 Choice-Vend Division of The Seeburg Corporation, to obtain Coca-Cola approval of its vending machines (Miller, Tr. 1993-2000; Coleman, Tr. 2106-08; RX 283 A-B, 284 A-B, 1-4, 428 A-B, 5, 285 A-B, 6, 7 A-D, 286 A-B, 11, 13-14, 287 A-C, 15-19, 288 A-C, 20, 273).

159. As Max Miller, formerly President of Choice-Vend Corporation and now President of the Choice-Vend Division of The Seeburg Corporation, testified on direct examination by complaint counsel, prior to 1955, "when we first went into our production on our machine, I went to Atlanta myself to interview the Coca-Cola people with respect to getting our machine into their line with their bottlers. And was unsuccessful at that time and five or six times after that" (Tr. 1993).

160. Choice-Vend and Seeburg/Choice-Vend submitted vending machines for Coca-Cola testing and approval on numerous occasions since 1954 (Miller, Tr. 1994; RX 283 A-B, 284 A-B, 3, 285 A-B, 6, 286 A-B, 13, 287 A-C, 288 A-C). For example, in 1958, Choice-Vend sent a model 200 machine to Coca-Cola for testing. Mr. Miller testified that "I badgered them and asked them to please look it over and they allowed me to send it in . . . ." This machine was not accepted by Coca-Cola (Miller, Tr. 1995; RX 283 A-B). Mr. Miller further testified that Coca-Cola advised him of no reason for rejecting the model 200. "They just returned the machine to us and the only thing we got was that it was unacceptable. Did not meet their standards"

(Tr. 1996), although they did mention "the possibility we didn't have financial status enough to maybe stay in business. And if their bottlers bought any of our machines the possibility of us going out of business and they being unable to get parts at a future date, and so forth" (Tr. 1997).

161. On at least six occasions, Coca-Cola evaluated Choice-Vend or Seeburg/Choice-Vend bottle and can vending equipment, and on each occasion, perfunctorily rejected such equipment for various reasons, including inadequate refrigeration performance (RX 283 A-B, 284 A-B, 285 A-B, 286 A-B, 287 A-B, 288 A-C).

162. There is no evidence that Coca-Cola cooperated with choice-Vend Corporation or the Choice-Vend Division of The Seeburg Corporation in connection with the machines they submitted for approval over the years, despite the willingness expressed by Choice-Vend to work out any necessary changes to their machines (RX 4, 6). Coca-Cola often gave Choice-Vend no reason "whatsoever" for rejecting Choice-Vend machines, "[t]hey just returned the machine to us and the only thing we got was that it was unacceptable. Did not meet their standards" (Miller, Tr. 1966). Coca-Cola did communicate with Choice-Vend when it rejected the latter's "Quart Vendor", but only commented that "from a refrigeration standpoint, this machine does not function satisfactorily to meet our temperature requirements" (RX 5), and did not suggest ways to modify or correct the apparent defects. There is no evidence that Coca-Cola ever transmitted its engineering evaluations of Choice-Vend machines to Choice-Vend as it did with its traditional suppliers (Finding No. 62).

163. Many of the same Choice-Vend machines that had been denied approval by The Coca-Cola Company had been approved for sale to the various "trade" bottlers, including those associated with the Pepsi-Cola Company. Among

these machines were the Choice-Vend models 72 and 200 (RX 426 A-B; cf. Coca-Cola's rejection, RX 284 A-B and RX 283 A-B); Choice-Vend's model 120 Bottle Vendor, which had been approved by Pepsi-Cola after certain deficiencies in the refrigeration performance had been modified and corrected in accordance with Pepsi-Cola's suggestions (RX 430 A-B, 429; cf. Coca-Cola's rejection, RX 287 A-C); and Choice-Vend's model 235 Can Vendor (RX 425; cf. Coca-Cola's rejection, RX 288 A-C).

164. Pepsi-Cola's refrigeration standards were "as stringent" as those of Coca-Cola's (Brinkmann, Tr. 1717-18).

165. Choice-Vend and Seeburg (Choice-Vend) experimented with various approaches to Coca-Cola in an effort to achieve some form of Coca-Cola acceptance of its machines. In 1959, Choice-Vend Corporation prepared a draft patent license arrangement with Navarre Corporation, which already had an established relationship with The Coca-Cola Company (Steeley, Tr. 1841-43), whereby Choice-Vend proposed to grant Navarre the right "to manufacture, use and sell" coolers made under Choice-Vend patents "to Coca-Cola Bottlers and to The Coca-Cola Co." in return for certain royalties (RX 7-A). By the terms of the proposed license agreement, both parties recognized "the necessity that before offering such coolers for sale to Coca-Cola Bottlers, Navarre must first obtain official written approval by The Coca-Cola Company of such coolers designed by Navarre for sale hereunder to Coca-Cola Bottlers" (RX 7-B).

166. In 1960, W. H. Clarke, Vice President of Seeburg, contacted Carl A. Navarre, head of Navarre Corporation, to advise him of Seeburg's plan "to tackle the 'Coke' business" by setting up a "separate manufacturing plant in some strategically located area, and, with appropriate modifications, manufacture solely for 'Coke' bottlers under another trade name" (CX 141-A). Mr. Clarke was ap-

proaching Mr. Navarre as to the possibility of having his "Nareo sales force handle the line exclusively" (CX 141 A; RX 11).

167. Neither the proposed patent license arrangement nor the separate manufacturing facilities plan ever materialized (Coleman, Tr. 2108). As Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, testified on direct examination by complaint counsel, "I think we would have done anything to obtain Coca-Cola business. Because it was so necessary to our success" (Tr. 2108).

168. Seeburg/Choice-Vend's efforts to obtain Coca-Cola approval of their bottle and can vending machines reached a climax in December 1961, when it made a major sales presentation to high officials of The Coca-Cola Company. Mr. Miller testified that in 1961, Seeburg/Choice-Vend hired Mr. Joe Eckford, "a retired employee of the Coca-Cola Company" to arrange a sales presentation with the executive officers of The Coca-Cola Company (Tr. 1998). Prior to that presentation, which was held in December 1961, Seeburg/Choice-Vend contacted the "eight or ten" Coca-Cola bottlers (out of some 1000) who had purchased Seeburg/Choice-Vend equipment in an effort to get their "frank evaluation" "on the operation and performance" of its "bottle vending units" "so that we may incorporate it in our presentation to the people in Atlanta", and receive favorable reports (Miller, Tr. 1999; RX 14). Seeburg/Choice-Vend submitted one can and two bottle vending machines for Coca-Cola testing prior to the December 1961 presentation (Miller, Tr. 1998-99).

169. In December 1961, Seeburg/Choice-Vend made its sales presentation to high Coca-Cola officials, including Patrick L. O'Malley and Charles Adams (RX 17, 18, 20). Mr. Miller, at the request of John L. Douglas, Purchasing Agent for Coca-Cola, subsequently on December 14, 1961, provided Coca-Cola with additional information relating

to Choice-Vend's finance plans, incentive programs, and freight programs, and indicated he would be "pleased to sit down and discuss with you any special type program that you would like tailored for your bottlers. I am certain that we can come up with a plan that will be satisfactory to you" (RX 16).

170. Seeburg/Choice-Vend's optimism (RX 20) regarding the outcome of its December 1961 presentation to Coca-Cola "for approval" (RX 19) was premature. In early January 1962, Seeburg was informally advised that "we have been turned down for approval by Coca-Cola Co." (CX 142).

171. On February 5, 1962, by letter from Charles W. Adams, Vice President of Coca-Cola Company, to Delbert W. Coleman, President and Chairman of The Seeburg Corporation, Coca-Cola officially advised Seeburg that after giving "serious consideration" to Seeburg's request that it "be approved as an additional supplier to Coca-Cola Bottlers for both bottle and can vendors", and "[w]hile we are confident Seeburg would make a good supplier to our Bottlers", Coca-Cola has "not approved" Seeburg since it did not meet "our requirements for approving new suppliers" (RX 273). These "requirements" were stated to be as follows:

> "(a) Make available equipment of same quality as now being purchased by Coca-Cola Bottlers, but at a lower price;
>
> "(b) Make available equipment of superior quality but at same price as equipment now being purchased;
>
> "(c) Supply needed equipment not now available from present suppliers; or
>
> "(d) By some other means save Coca-Cola Bottlers money on their equipment purchases" (RX 273).

172. Thus, even though Coca-Cola was "confident Seeburg would make a good supplier" (RX 273) to its bottlers, and no longer raised any questions as to the sufficiency of Seeburg's bottle and can vending equipment from an engineering standpoint, Coco-Cola rejected Seeburg's bid for approval, thereby precluding the opportunity for "successful marketing" of Seeburg/Choice-Vend's complete line of bottle and can vending equipment to Coca-Cola bottlers who, according to the stipulated sales data, purchased over 53% of all such machines sold in both the Coca-Cola and "trade" bottler segments of the vending industry on a unit and dollar basis in 1963 (RX 485-86).

173. Because of Coca-Cola's continued rejections of Seeburg/Choice-Vend equipment, even after there were no longer any apparent engineering defects with its machines, Seeburg/Choice-Vend "discontinued all approaches to them after 1961" (Miller, Tr. 1999).

174. The second consideration prompting Seeburg's decision to acquire Cavalier was the growing involvement of Coca-Cola bottlers in full-line vending and active participation of Coca-Cola and its bottlers in the National Users market, which was otherwise beyond Seeburg's reach.

175. As Mr. Coleman testified:

> "Coca-Cola represented a very large segment of the bottle-vending industry. Primarily because they were very on-premises-consumption minded. And in addition, many of their bottlers were moving into full-line vending because here the institutions, plants, schools, and so forth, didn't want to deal with Coca-Cola bottlers for one thing and somebody else for a coffee machine and somebody else for cigarette machines and somebody else for something else. They wanted one

responsible person to come in and put in all the equipment.

"So you had a natural evolution of Coca Cola bottlers to full line vending" (Tr. 2105).

176. Mr. Coleman further testified:

"We had these, what we call national users, where there were thousands and thousands of service stations, and so forth, throughout the nation. And I refer particularly to the larger major gasoline and oil companies which Coca Cola was very aggressively working with. And unless we could find some way to sell the Coca Cola bottlers, there was just one of our major competitors who sold Coca Cola a full line and that was Vendo. We had tried on several occasions to have our Choice Vend equipment approved by the Coca Cola people. And at one time were told it just wasn't our machine, they didn't want any more suppliers than they had, or words to that effect" (Tr. 2106).

177. Accordingly, Mr. Coleman testified:

"Consequently, for us to be out of the Coca-Cola market with these two things [Coca Cola bottler activity in National Users program and full line vending] happening in the industry would have virtually left all that business to our major competitor which ultimately would have been a very serious problem for us.

"So we have two problems. We had to move ourselves into full line vending as quickly as we possibly could. And we had to find a way to sell the Coca-Cola bottlers which represented such a major portion of the business. Plus this other opportunity [National Users market] that wasn't open to us. And it appeared to

us this would be an opportunity for us to sell the Coca-Cola bottlers so that we could properly compete with our competitor.

"With our major competitor, Canteen wasn't making bottle vending equipment, so the only one we had to concern ourselves with was Vendo. So we concluded that the only way we were going to be a supplier to Coca Cola was to buy Cavalier. So we did merge to further diversification. And that judgment has been correct" (Coleman, Tr. 2106-07).

178. In light of Seeburg's failure to obtain Coca Cola approval, and the importance of selling Coca Cola bottlers to Seeburg's competitive position, Mr. Coleman testified that Seeburg, having "nowhere else to turn", acquired Cavalier "as a last resort" (Tr. 2108).

2. *Considerations Prompting Cavalier's Association with Seeburg*

179. At the time of the challenged acquisition in 1963, Cavalier was a single line supplier of bottle and bottle/can vending machines which specialized in the sale of its Coca-Cola approved equipment exclusively to Coca-Cola bottlers (Graham, Tr. 1946-47; CX 25). As William G. Raoul, formerly President of Cavalier and now President of Cavalier Division of The Seeburg Corporation, testified on direct examination by complaint counsel, "[w]e didn't have any equipment associated with us. We were isolated with a specialized product, and our market was changing. The [Coca-Cola] bottlers were rapidly getting into full-line vending" (Tr. 2084).

180. Cavalier's efforts to sell bottlers other than Coca-Cola in the mid-1950's "weren't very successful" (Raoul, Tr. 2066-67). As Mr. Raoul testified, Cavalier's efforts to

sell these other companies began in 1955, but by 1957 "it was pretty obvious that they weren't going to achieve success" (Tr. 2067; Graham, Tr. 1970-72). Cavalier tried to sell "trade" bottlers, including Dr. Pepper, Nehi, Seven-Up, and Pepsi-Cola (Raoul, Tr. 2066-75; Graham, Tr. 1971-72).

181. After 1957, Cavalier no longer solicited any "trade" bottlers (Raoul, Tr. 2072). In explaining this development, Mr. Raoul testified, since "our sales force would have to spend an inordinate amount of time cultivating a wholly different market for very uncertain results .... And the volume of the business was quite uncertain", Cavalier once again specialized in sales exclusively to the Coca-Cola bottlers (Raoul, Tr. 2072).

182. In addition, manufacturing considerations affected Cavalier's decision to cultivate Coca-Cola bottlers exclusively. As Mr. Raoul testified:

> "On the manufacturing side there were considerations too which still apply. It would be very difficult for us if we had to do any volume of business with those other companies. It would mean making the machine which we now make on one basic form, we would have to make it in several different forms" (Tr. 2073).

183. The different manufacturing problems involved in selling the "trade" bottlers involved "not only [the] type of paint and decorative trim, [but] in some cases the actual dies . ..." (Raoul, Tr. 2074). In addition, a different assembly and finishing sequence for bottle vending machines would have been necessary (Raoul, Tr. 2074-75).

184. The "natural evolution of Coca-Cola bottlers" into full-line vending "was the industry trend" (Coleman, Tr. 2105). At the time of the challenged acquisition, there "was a trend" toward full-line operations by Coca-Cola

and "trade" bottlers "that started from nothing to where it is today. There are more bottlers moving into the industry full line every day" (Coleman, Tr. 2112). Other industry witnesses corroborated Mr. Coleman's testimony as to the rapid increase in full-line vending by soft drink bottlers, and particularly the active development in this field by Coca-Cola bottlers (Brinkmann, Coca-Cola bottlers were engaged in full-line vending and the number of bottlers so engaged was on the "increase", Tr. 1718; Raoul, "the bottlers were rapidly getting into full-line vending" (Tr. 2084)).

185. In addition, Coca-Cola and Coca-Cola bottlers were "aggressively" working with National Users, who purchased matched banks of equipment in their many locations (Coleman, Tr. 2106).

186. Prior to the Seeburg acquisition in 1963, "Cavalier had developed a working arrangement with the Coca-Cola bottlers over a number of years, but Cavalier did not sell equipment to bottlers other than Coca-Cola, nor did Cavalier produce candy, cigarette and coffee machines" (RX 450 A). Access to such machines was necessary if Cavalier was to remain competitive in a changing market where banks of equipment were required for use in Coca-Cola bottlers' full-line vending operations and participation in the growing National Users field (Finding No. 120).

187. Cavalier was quite concerned over its inability to achieve capacity to participate in the National Users market under the program established by The Coca-Cola Company. It "... was a source of great anxiety to us, because we could see the handwriting on the wall very clearly, because we had to participate in that market if we were going to remain a major supplier" and "we had no way of doing it. This was of great concern to myself and Mr. Lane who was Chairman of the company at that time" (Raoul, Tr. 2080).

188. In light of this "great concern", Messrs. Raoul and Lane went "to attend a session of the American Management Association on the subject of mergers and acquisitions to see if there was any possible combination we could find that would give us an entry into this [National Users] field because Vendo had it locked up. And, of course, they were the only company able to do it" (Raoul, Tr. 2080). This testimony was corroborated by documentary evidence, received without objection from complaint counsel, which indicated that "[i]f Cavalier had not merged with Seeburg, the oil companies would have only one source of supply for the purchase of vending machines under the National User Program because only The Vendo Company would have had the combination of elements required to serve this market" (RX 450A, C-D; see also Brinkmann, Tr. 1722; Coleman, Tr. 2106).

189. Accordingly, Cavalier merged with Seeburg anticipating as the greatest benefit "'[t]he fact that we would have, . . . access to a line of general vending equipment which would enable us to compete with Vendo effectively in the national user market. Vendo had no competition in the field at that time" (Raoul, Tr. 2083).

190. Subsequent to the challenged acquisition, Cavalier continued to operate under its previous management. Thus, Cavalier continued to sell its bottle and can vending machines only to Coca Cola bottlers, through its own direct sales force (Raoul, Tr. 2055; Graham, Tr. 1947). Cavalier machines at no time were sold through Seeburg distributors to vending operators or to customers other than Coca-Cola bottlers. At all pertinent times Cavalier was operated as a separate Division of The Seeburg Corporation, and was not in any way integrated with the Choice-Vend Division, Seeburg's supplier of bottle and can vending machines to non-Coca Cola bottlers (Graham, Tr. 1947; Raoul, Tr. 2054-55; Adair, Tr. 2132-33, 2139; CX 10, p. 2; 11, p. 7; 39, p. 8).

VII. Consequences and Aftermath of Acquisition

A. *Widened Opportunity for Bottle and Can Vending Machines Sales to Coca-Cola and "Trade" Bottlers*

191. The following charts, Respondent's Exhibits 476 and 477, reflect the unit and dollar value of sales of coin-operated bottle vending machines as a percentage of stipulated sales of such machines in the Coca-Cola bottler segment of the vending industry in 1965, two years after the challenged acquisition.*

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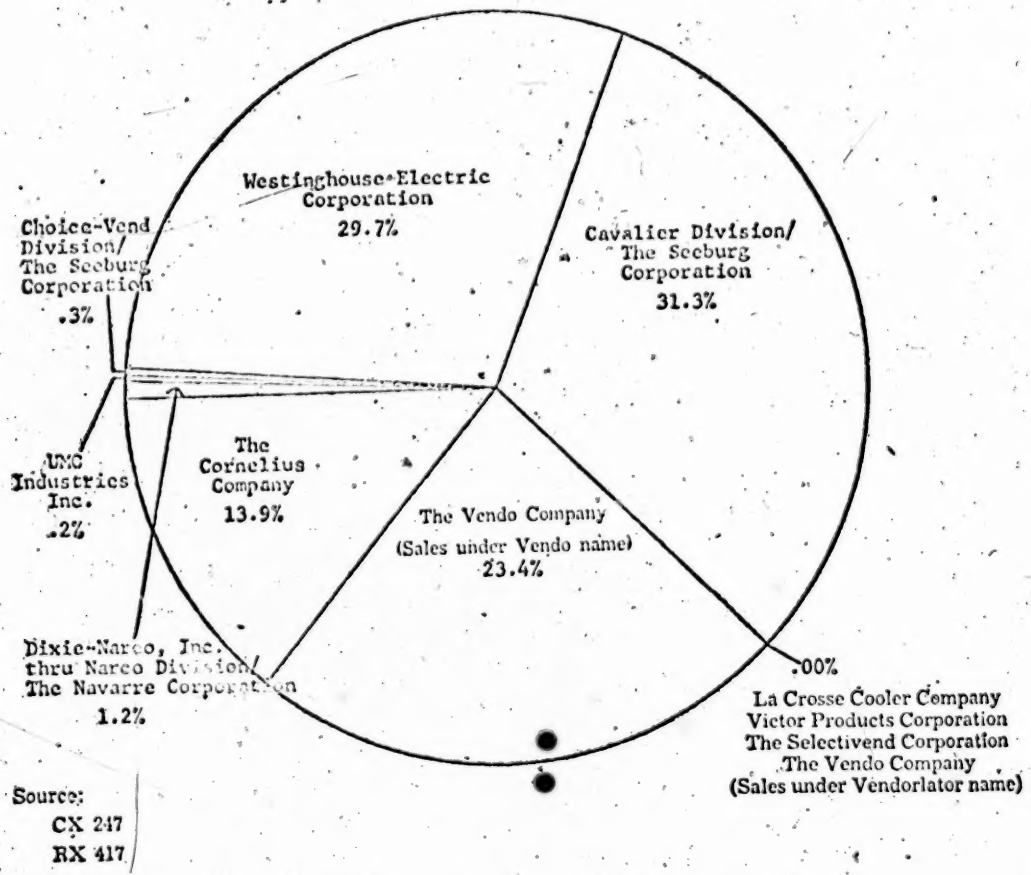
* Although the Cavalier Division of Seeburg appears by the charts to have attained first position in the sale of vending machines to Coca-Cola bottlers after the acquistion in question, its effect or potential effect anticompetitively under Paragraph 19 of the complaint seems totally obscure as related to the manufacture and sale of vending machines of all types and the manufacture and sale of bottle vending machines since both of the companies which merged were competing in segments only of the total market and not with each other. In other words, it was a uniting of uncompetitive segments in the overall markets alleged by which means the merged companies could reasonably be expected to create competition therein with vending machine manufacturers who were already competitive or potentially competitive in the diversified markets defined by the complaint and evidenced.

RESPONDENT'S EXHIBIT 476

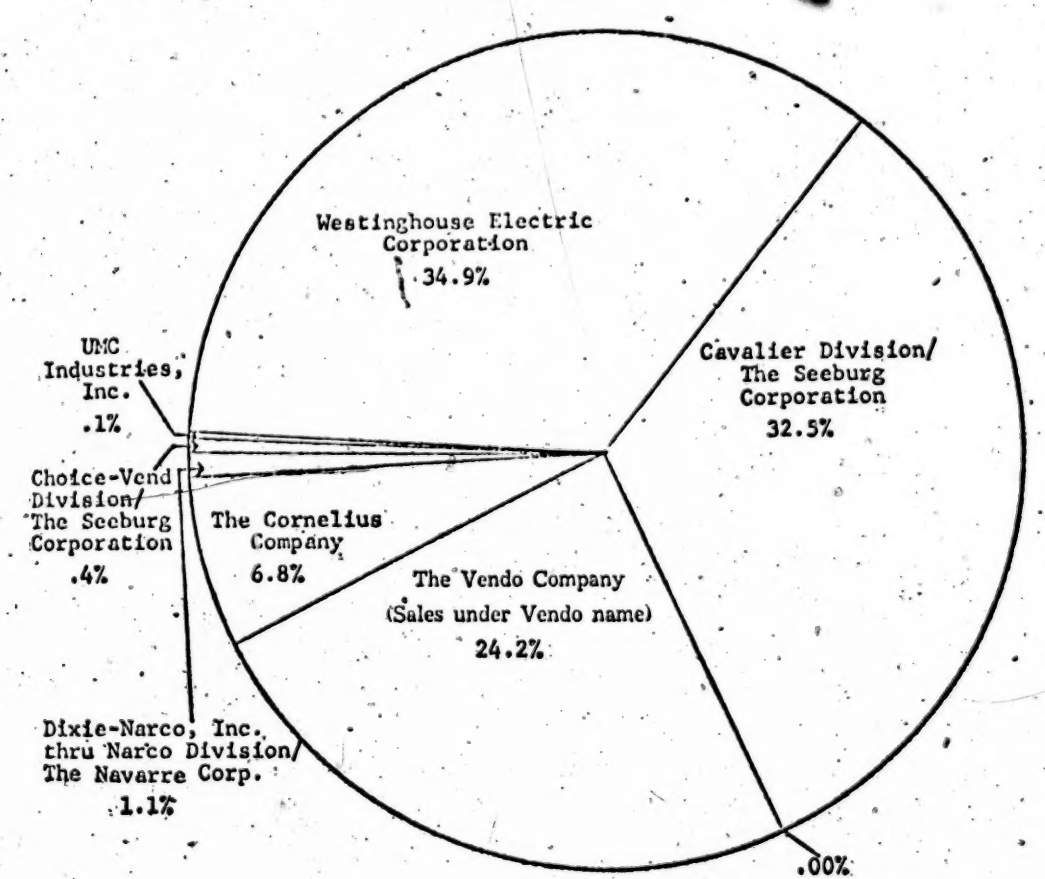
SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN UNITS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO COCA COLA BOTTLERS
FOR 1965



Source:
CX 247
RX 417

RESPONDENT'S EXHIBIT 477.

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN DOLLARS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO COCA COLA BOTTLERS
FOR 1965



Source:

CX 247

RX 417

192. In this segment of the vending industry, the stipulated sales data show that the established suppliers, Westinghouse, Vendo, and Cavalier, supplied 91.6% of the bottle vending machines to Coca-Cola bottlers on a dollar basis two years after the acquisition in 1965, down slightly from 92.6% in 1963 (RX 477, 475).

193. During those two years, Cavalier's own percentage of such sales remained static. At the same time, Cornelius, a smaller, more recent entrant in this field, was able to significantly improve its bottle vending machine sales to Coca-Cola bottlers, increasing its percentage of such sales from 4.3% to 6.8% on a dollar basis; and from 9.1% to 13.9% on a unit basis (RX 474-477).

194. These sales and market share statistics permit no inference that the challenged acquisition, which substituted Seeburg/Cavalier for Cavalier Corporation as an approved supplier of bottle and can vending equipment to Coca-Cola bottlers, adversely affected any company's opportunity for sale of bottle and can machines to Coca-Cola bottlers, or gave undue competitive advantages to Seeburg (RX 474-477).

195. Actual market behavior establishes that since the challenged acquisition, competition in the Coca-Cola bottler segment of the vending industry has increased and intensified.

196. In July 1966, Coca-Cola revised its equipment approval policy for bottle and/or can vending equipment, notified several formerly unaccepted vending machine manufacturers of this change, and invited them to submit equipment for testing, with the result that competition in the sale of vending equipment to the Coca-Cola bottler segment of the vending industry has actually opened up (Small, Tr. 1300-01; Ebner, Tr. 1733-34, 1741-42, 1744-46; Teeter, Tr. 1787, 1789; RX 434 A-D, 433 A-B, 432, 431).

197. Prompted by the desire "to improve the competitive position of Coca-Cola and our related products" (RX 432, 431, 433 B), Coca-Cola, in 1966, "made the basic policy decisions necessary to change both the emphasis of and the procedure for our evaluation tests [with respect to bottle vending equipment] in the future, and we are now setting up the procedures and criteria which will be required for the implementation of these policy decisions" (RX 434 C). Coca-Cola also plans "to discontinue the practice of simply accepting or rejecting bottle vendors. We will, instead, provide the bottlers with copies of our revised evaluation reports in order to better assist them in their individual purchases of bottle vendors" (RX 434 C).

198. Although full implementation of the new procedures was not anticipated by Coca-Cola until March 1967, the company took prompt steps in 1966 to notify equipment manufacturers of their new opportunity to compete for Coca-Cola bottlers' business (RX 434 C).

199. Specifically, in May 1966, "a task force" from Coca-Cola toured the United States to visit the plants and evaluate the capabilities of major vending machine manufacturers, including those not previously approved by Coca-Cola, such as Choice-Vend Division of The Seeburg Corporation, the Cornelius Company (which was not approved for automatic bottle vending equipment) and Selectivend Corporation (RX 434 C; Teeter, Tr. 1787, 1789).

200. On July 7, 1966, Coca-Cola notified manufacturers of vending equipment of its "new sales equipment valuation (sic) policy by letter from our Marketing Vice President", including "Choice Vend Division of the Seeburg Corporation, the Cornelius Company, the LaCrosse Cooler Company, and Selectivend Corporation" (RX 434 C, 435, 432, 433 A-B). For example, in its letter of July 7, 1966 to Max Miller, President of Choice-Vend Division

of Seeburg, Coca-Cola advised that it will now evaluate sales equipment submitted by reputable manufacturers which promises to serve our general marketing goals" and make the results "available to our Bottlers" (RX 432). In addition, Coca-Cola noted that the change was necessitated "to improve the competitive position of Coca-Cola" and related products and its hope that the program "will result in expanded markets" for its bottlers and suppliers (RX 432).

201. In addition, on July 12, 1966, Coca-Cola informed all its bottlers of the change in its equipment approval policy, stating that "[c]hanges always are necessary if we are to improve our competitive position and we trust that this program will result in increased sales and profits for us all" (RX 431).

202. As Coca-Cola stated in its letter to Mr. Charles Brinkmann, General Manager of its long approved supplier Westinghouse, advising of the revision to Coca-Cola's equipment approval policy, the change will "inevitably make certain equipment available to our bottlers which has previously been available only to [Coca-Cola] competitors" (RX 433 A).

203. Pursuant to the 1966 Coca-Cola change of policy, "the following manufacturers have been invited to submit machines to The Coca-Cola Company": Choice-Vend Division of The Seeburg Corporation, The Cornelius Company, The Selectivend Corporation and Steelmade, Inc., none of which—except for Cornelius' special horizontal models—were previously approved suppliers of Coca-Cola machines (RX 434 C-D). In this connection, Harold Teeter, President of Selectivend, testified that Selectivend had already submitted a machine for Coca-Cola approval in 1966 and that he understood it to have received a "favorable" report (Teeter, Tr. 1787, 1789). In addition, Mr. Small of Victor Products, and Mr. Ebner of LaCrosse,

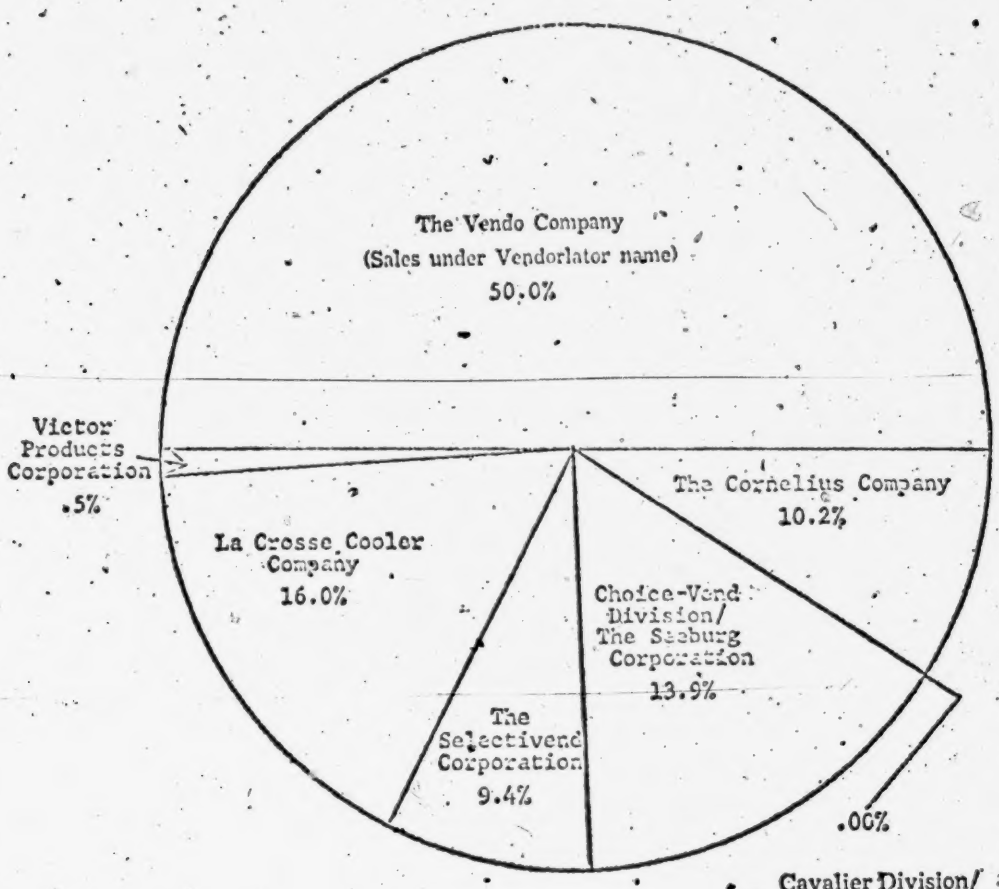
both testified that these "trade" bottler suppliers also had submitted machines to Coca-Cola for approval in 1966 (Small, Tr. 1300; Ebner, Tr. 1745). Finally, Rock-Ola Mfg. Corp., a recent entrant in the vending machine manufacturing industry, found the "Coca-Cola Company decision to revise its procedure format in the area of equipment-evaluation" "most interesting", and is seeking "permission to participate" in order to obtain Coca-Cola approval (RX 435).

204. In sum, since the acquisition in 1963, Coca-Cola's 1966 revision in its equipment approval policy has created the framework for a significant change, opening up the vending machine supply picture in the Coca-Cola bottler segment of the industry, with increased competition already a reality, and an intensified competitive struggle in prospect for the future (Findings No. 196-203).

205. In the "trade" bottler segment of the vending industry, the following charts, Respondent's Exhibits No. 480 and 481, reflect the unit and dollar value of sales of coin-operated bottle vending machines as a percentage of stipulated sales of such machines in 1965, two years after the challenged acquisition.

RESPONDENT'S EXHIBIT 480

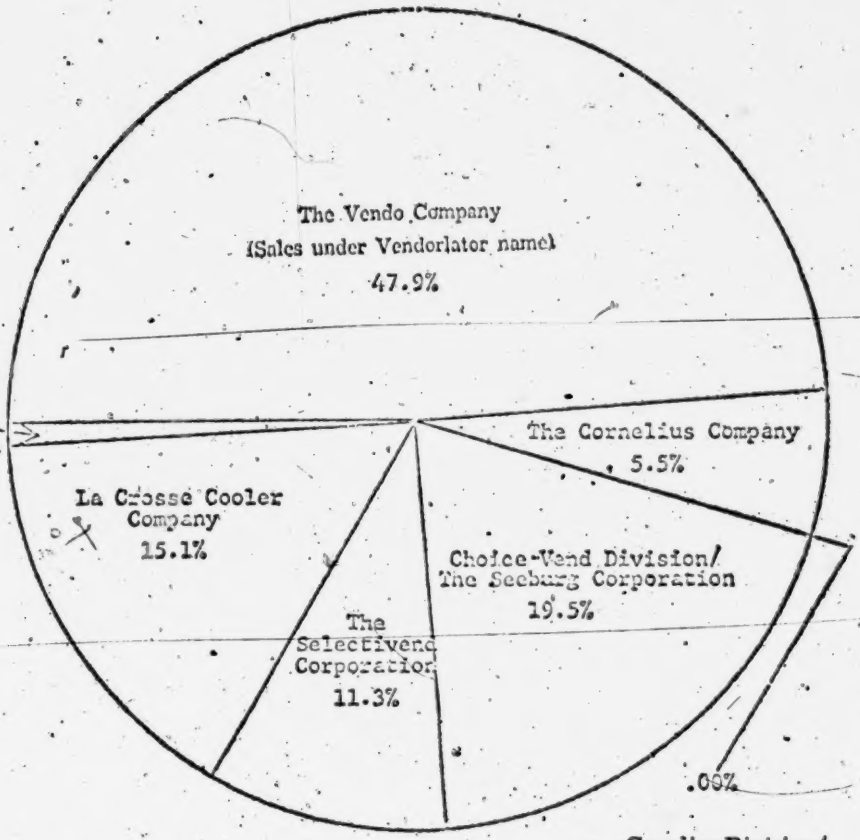
SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN UNITS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO TRADE BOTTLERS (e.g. PEPSI COLA, ROYAL CROWN, ETC.)
FOR 1965



Source:
CX 247
RX 417

RESPONDENT'S EXHIBIT 481

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN DOLLARS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO TRADE BOTTLERS (e.g. PEPSI COLA, ROYAL CROWN, ETC.)
FOR 1965



Cavalier Division/
The Seeburg Corporation
Westinghouse Electric
Corporation
UMC Industries, Inc.
The Vendo Company
(Sales under Vendo name)
Dixie-Narco, Inc. thru
Narco Division,
The Navarre Corp.

Source:
CX 247
RX 417

206. According to the stipulated sales data, Vendorlator's dominance in this segment of the market actually increased since the acquisition, with its percentage of bottle vending machine sales to "trade" bottlers growing to 50% on a unit basis and 47.9% on a dollar basis in 1965, up from 46.7% on a unit basis and 45.6% on a dollar basis in 1963) (RX 478-81).

207. By contrast, on the basis of stipulated sales data, Seeburg has relatively lost ground as a "trade" bottler supplier since the challenged acquisition, as sales of coin-operated bottle vending machines by its Choice-Vend Division have declined from 18% to 13.9% on a unit basis (RX 478, 480) and 23.2% to 19.5% on a dollar basis between 1963 and 1965 (RX 479, 481).

208. Since the challenged acquisition, both LaCrosse and Selectivend, which are among the smaller firms serving this segment of the vending industry (CX 247; RX 417), have increased their share of sales of coin-operated bottle vending machines in the "trade" bottler segment of the vending industry. According to the stipulated sales data, LaCrosse has shown increases from 13.0% to 16.0% on a unit basis and 12.4% to 15.1% on a dollar basis between 1963-1965, while Selectivend has shown sales gains from 9.0% to 9.4% on a unit basis and 10.5% to 11.3% on a dollar basis during the same period (RX 478-481). The percentage of such sales by Cornelius during this period has remained approximately the same (RX 478-481).

209. Only Victor Products share of bottle vending machines to "trade" bottlers has declined since the challenged acquisition, from 3.0% to .7% on a dollar basis (RX 479, 481) and 2.4% to .5% on a unit basis (RX 478, 480). But these sales were not lost to Seeburg's Choice-Vend Division, whose own share of sales to this class of customers declined (RX 478-481). The record evidence refutes any inference that the challenged acquisition may

have adversely affected Victor Products. Roy M. Small, Executive Vice President of Victor Products, testified that he observed "no" difference in the market conditions affecting his business after the Seeburg/Cavalier acquisition because Victor Products and Cavalier did not solicit each other's customers (Tr. 1303-04).

210. Paralleling developments in the Coca-Cola bottler segment of the vending industry, manufacturer participation in the "trade" bottler field has also broadened since the challenged acquisition. Westinghouse Electric Corporation, which supplied bottle can vending equipment exclusively to Coca-Cola bottlers for over 35 years, in the latter half of 1966 "set up a general bottle (sic) sales organization to call on all other bottlers, like Pepsi-Cola, Dr. Pepper and 7-Up" (Brinkmann, Tr. 1703), after seeking and obtaining the approval of the parent syrup companies "before we went out and actually called on the bottlers", since approval "is very essential to successful marketing" of vending machines (Brinkmann, Tr. 1717).

211. The Dr. Pepper Company, in a notice to its bottlers regarding the approval of Westinghouse vendors on August 30, 1966, indicated that the "addition" of "the Westinghouse line" broadens "the base of our vendor supply structure", and "brings to Dr. Pepper Bottlers a new dimension of quality, experience and success in the vendor manufacturing field" (RX 436 A). Upon receiving approval from Dr. Pepper, Westinghouse vendors became eligible for all the benefits that flow therefrom, including qualifying for credits and other benefits under the "Dr. Pepper Bottler Vendor Incentive Programs", and for financing "under the Chemical Bank Vendor Finance Program for Dr. Pepper Bottlers" (Ibid.).

212. In addition, Thomas B. Donahue, Vice Chairman of the Board of UMC Industries, Inc., testified that its Glasco subsidiary, an approved supplier of vending equip-

ment only to Coca-Cola bottlers, "may" in the future expand its facilities to solicit business in the "trade" bottler segment of the industry (Donahue, Tr. 1439).

213. In sum, competition in the "trade" bottler segment of the vending industry, as in the Coca-Cola bottler segment, has also intensified since the challenged acquisition, with additional manufacturers now soliciting "trade" bottler customers for their business (Findings No. 210-212).

214. While the ultimate outcome of these most recent competitive developments in the vending industry is not certain on this record, it is clear that today, three years after the challenged acquisition, bottlers of all types have a wider choice of vending equipment suppliers than before the acquisition in 1963, vending machine manufacturers have new and broader opportunities to serve new classes of customers, and all vending machine manufacturers face increased competition for the business of their traditional customers.

B. *Intensified Rivalry Among Manufacturers of Vending Machines*

215. The following tables, Respondent's Exhibits 468 and Commission's Exhibit 226, reflect stipulated sales in the United States during 1961-65, and percentage of census totals, of all coin-operated vending machines, on a unit and dollar basis, by manufacturers of such equipment whose representatives testified at the hearing in this case:

STIPULATED SALES OF MANUFACTURERS OF COIN-OPERATED VENDING MACHINES IN THE UNITED STATES 1961-1965
UNIT SALES AND PERCENT OF BUREAU OF THE CENSUS TOTAL

1961

Company [10]	Sales [1] (Units)	Percent of Total [2]
The Vendo Co.	94,412	15.2%
Sales under Vendorlator name	28,048	
Sales other than under Vendorlator name	66,364	
Universal Match Corp. [4]	51,401	8.3
Canteen Corp.	34,056	5.5
Cavalier Corp.	19,403	3.1
The Seeburg Corp.	16,053	2.6
Westinghouse Electric Corp.	10,211	1.6
La Crosse Cooler Company	9,860	1.6
Victor Products Corp.	3,729	.6
Dixie Narco, Inc.	2,756	.3
The Selectivend Corp.	1,546	.2
Census Totals [5]	620,981	

1962

Company [11]	Sales [1] (Units)	Percent of Total [2]
The Vendo Co.	93,479	13.7%
Sales under Vendorlator name	29,085	
Sales other than under Vendorlator name	64,394	
Universal Match Corp. [4]	50,563	7.4
Canteen Corp.	43,349	6.3
The Seeburg Corp.	30,005	4.4
Cavalier Corp.	17,449	2.6
Westinghouse Electric Corp.	15,738	2.3
La Crosse Cooler Company	9,503	1.4
The Cornelius Company	5,986	.9
Victor Products Corp.	5,452	.8
The Selectivend Corp.	2,459	.4
Dixie Narco, Inc.	1,967	.2
Census Totals [5]	682,687	

1963

Company [11]	Sales [1] (Units)	Percent of Total [2]
The Vendo Co.	82,248	13.6
Sales under Vendorlator name	28,634	
Sales other than under Vendorlator name	53,614	
Universal Match Corp. [4]	46,123	7.6
Canteen Corp.	33,393	5.5
The Seeburg Corp.	27,115	4.5
Cavalier Corp.	23,164	3.8
Westinghouse Electric Corp.	20,520	3.4
The Cornelius Company	12,960	2.1
La Crosse Cooler Company	7,790	1.3
The Selectivend Corp.	5,463	.9
Victor Products Corp.	4,586	.8
Dixie Narco, Inc.	1,879	.3
Census Totals [5]	604,965	

1964

Company [12]	Sales [1] (Units)	Percent of Total [2]
The Vendo Co.	92,905	14.
Sales under Vendorlator name	35,111	
Sales other than under Vendorlator name	57,8?4	
The Seeburg Corp.	59,005	9.
Cavalier Division [3]	25,963	
Other	33,042	
Universal Match Corp. [4]	49,700	7.9
Canteen Corp.	28,750	4.6
Westinghouse Electric Corp.	28,366	4.5
The Cornelius Company	19,780	3.1
La Crosse Cooler Company	11,920	1.9
The Selectivend Corp.	8,919	1.4
Victor Products Corp.	3,878	.6
Dixie Narco, Inc.	1,728	.2
Census Totals [5]	628,023	

EXPLANATION:

[1] Unit sales of coin operated vending machines in the United States by companies included in the stipulation with sales of same. Source: CX 247.

[2] Relationship of unit sales of coin operated vending machines in the United States to the total units shipped (including export shipments) reported by the Bureau of the Census.

[3] Cavalier Corporation was acquired by The Seeburg Corporation on December 3, 1963.

[4] Universal Match Corporation changed its name to UMC Industries, Inc., in 1965.

[5] Unit total of manufacturers' shipments (including export shipments) as reported to the Bureau of the Census (current Industrial Reports, Vending Machines, Series M35E).

[6] CX 98.

[7] CX 99.

[8] CX 100.

[9] CX 244.

[10] According to CX 98, there are at least 67 additional companies with sales of coin operated vending machines.

[11] According to CX 99, there are at least 65 additional companies with sales of coin operated vending machines.

[12] According to CX 244, there are at least 70 additional companies with sales of coin operated vending machines.

[13] According to CX 244, there are at least 32 additional companies with sales of coin operated vending machines.

Respondent's Exhibit 468

STIPULATED SALES OF MANUFACTURERS OF COIN-OPERATED VENDING MACHINES IN THE UNITED STATES 1961-1965
UNIT SALES AND PERCENT OF BUREAU OF THE CENSUS TOTAL

1962			1963			1964			1965		
	Sales[1] Units	Percent of Total[2]	Company[11]	Sales[1] Units	Percent of Total[2]	Company[12]	Sales[1] Units	Percent of Total[2]	Company[13]	Sales[1] Units	Percent of Total[2]
	93,479	13.7%	The Vendo Co.	82,248	13.6	The Vendo Co.	92,907	14.8%	The Vendo Co.	107,879	15.9%
29,085			Sales under Vendorlator name	28,624		Sales under Vendorlator name	35,111		Sales under Vendorlator name	45,344	
64,394			Sales other than under Vendorlator name	53,614		Sales other than under Vendorlator name	57,876		Sales other than under Vendorlator name	62,305	
	50,563	7.4	UniversalMatch Corp.	46,123	7.6	The Seeburg Corp.	59,005	9.4	Universal Match Corp.	53,249	8.2
	43,349	6.3	Canteen Corp.	33,393	5.5	Cavalier Division	25,963		The Seeburg Corp.	52,008	7.7
	30,005	4.4	The Seeburg Corp.	27,115	4.5	Other	33,042		Cavalier Division	22,584	
	17,449	2.6	Cavalier Corp.	23,104	3.8	Universal Match Corp.	49,700	7.9	Other	29,524	
	15,738	2.3	Westinghouse Electric Corp.	20,520	3.4	Canteen Corp.	28,730	4.6	Canteen Corp.	29,445	4.3
	9,303	1.4	The Cornelius Company	12,960	2.1	Westinghouse Electric Corp.	28,366	4.5	Westinghouse Electric Corp.	26,708	3.9
	8,080	1.2	La Crosse Cooler Company	7,790	1.3	The Cornelius Company	19,780	3.1	The Cornelius Company	16,286	2.4
	5,452	.8	The Selectivend Corp.	5,463	.9	La Crosse Cooler Company	11,920	1.9	La Crosse Cooler Company	13,876	2.0
	2,459	.4	Victor Products Corp.	4,786	.8	The Selectivend Corp.	8,649	1.4	The Selectivend Corp.	10,969	1.6
	1,007	.2	Dixie Narco, Inc.	1,879	.3	Victor Products Corp.	3,878	.6	Victor Products Corp.	2,370	.3
	682,887			605,675		Dixie Narco, Inc.	4,728	.8	Dixie Narco, Inc.	1,540	.2
							628,685			677,703	

[1] Sales of equipment sourced CX 247
except shipments reported by the Bureau of the Census

[2] Percent of total per Census Reports, Vending Machines, Series MA-35

[3] CX 100

[4] CX 244

[10] According to CX 95, there are at least 67 additional companies with sales of coin-operated vending machines that are not included on this exhibit

[11] According to CX 99, there are at least 55 additional companies with sales of coin-operated vending machines which are not included on this exhibit

[12] According to CX 244, there are at least 72 additional companies with sales of coin-operated vending machines; however, CX 244 does not include companies with annual sales of less than $100,000

[13] According to CX 244, there are at least 52 additional companies with sales of coin-operated vending machines; however, CX 244 does not include companies with annual sales of less than $100,000

MANUFACTURERS WITH OVER $5,000,000 ANNUAL SALES OF COIN-OPERATED VENDING MACHINES IN THE UNITED STATES 1961-1965
DOLLAR SALES AND PERCENT OF BUREAU OF THE CENSUS TOTAL

1961

Sales (Dollars)	Percent of Total[2]
$ 44,079,101[1]	25.8
21,347,859	12.5
18,467,216	10.8
8,828,080	5.2
6,642,000	3.9
$171,167,000[3]	

1962

Company	Sales (Dollars)[2]	Percent of Total[3]
The Vendo Co.	$ 44,712,355	25.9
Canteen Corp.	25,232,881	14.6
The Seeburg Corp.	21,754,088	12.6
Universal Match Corp.[4]	19,434,444	11.3
Cavalier Corp.	6,364,000	3.7
Westinghouse Electric Corp.	5,907,000	3.4
	$172,335,000[5]	

1963

Company	Sales (Dollars)	Percent of Total[2]
The Vendo Co.	$ 39,547,470	24.3
The Seeburg Corp.	22,572,000	13.8
Canteen Corp.	20,095,378	12.3
Universal Match Corp.[4]	18,518,565	11.3
Westinghouse Electric Corp.	8,999,000	5.5
Cavalier Corp.	8,269,000	5.1
	$163,521,000[5]	

1964

Company	Sales (Dollars)	Percent of Total
The Vendo Co.	$ 47,669,338	26.0
The Seeburg Corp.	34,237,000	18.6
Cavalier Div.	$ 9,370,844	
Other	24,866,156	
Universal Match Corp.[4]	23,779,764	12.9
Canteen Corp.	17,291,342	9.4
Westinghouse Electric Corp.	12,487,000	6.8
	$183,679,000[5]	

[1] ...ufactures in the United States, Section 6A 24C

[2] ...ted vending machines in the United States at the dollar value of shipments (including export shipments) reported by the Bureau of the Census.

[3] ...ed by Piqua Engineering Corporation December 2, 1963

[4] ...changed its name to CMC Industries, Inc., in 1966

[5] ...ments (including export shipments) as reported by the Bureau of the Census, Current Industrial Reports, Vending Machines, Series M35F

Commission's Exhibit 226

WITH OVER $5,000,000 ANNUAL SALES OF COIN-OPERATED VENDING MACHINES IN THE UNITED STATES 1961-1965
DOLLAR SALES AND PERCENT OF BUREAU OF THE CENSUS TOTAL

at. 2	1963 Company	Sales[1] (Dollars)	Percent of Total[2]
%	The Vendo Co.	$ 39,547,470	24.2%
	The Seeburg Corp.	22,572,000	13.8
	Canteen Corp.	20,095,378	12.3
	Universal Match Corp.[4]	18,518,565	11.3
	Westinghouse Electric Corp.	8,999,000	5.5
	Cavalier Corp.	8,269,000	5.1
		$163,521,000[5]	

1964 Company		Sales[1] (Dollars)	Percent of Total[2]
The Vendo Co.		$ 47,669,338	26.0%
The Seeburg Corp.		34,237,000	18.6
Cavalier Div.[3]	$ 9,370,844		
Other	24,866,156		
Universal Match Corp.[4]		23,759,764	12.9
Canteen Corp.		17,291,343	9.4
Westinghouse Electric Corp.		12,487,000	6.8
		$183,679,000[5]	

1965 Company		Sales[1] (Dollars)	Percent of Total[2]
The Vendo Co.		$ 57,019,329	28.5%
The Seeburg Corp.		31,507,000	15.7
Cavalier Div.[3]	$ 9,248,118		
Other	22,258,882		
Universal Match Corp.[4]		27,014,272	13.5
Canteen Corp.		18,360,857	9.2
Westinghouse Electric Corp.		13,658,000	6.8
		$200,313,000[5]	

by Bureau of the Census.

lines, Series M35L.

216. In the overall coin-operated vending machine segment of the vending industry, there is no substantial evidence to support complaint counsel's allegation that the effect of this acquisition "may be substantially to lessen competition or tend to create a monopoly" (Cplt., ¶ 19). If anything, the statistical evidence adduced would appear to show that rivalry among manufacturers in this segment of the vending industry is healthier today than before (CX 226; RX 468).

217. While Seeburg's percentage of all coin-operated vending machines sold increased slightly between 1963 and 1965 (from 13.8% to 15.7% on a dollar basis, and 4.5% to 7.7% on a unit basis), more significantly, the stipulated sales data show that the percentage of such sales by the combined Seeburg/Cavalier declined significantly in that period. Seeburg/Cavalier sales of all coin-operated vending machines amounted to 18.9% of all such sales on a dollar basis and 8.3% of such sales on a unit basis in 1963 (CX 226; RX 468). In 1965 Seeburg/Cavalier accounted for only 15.7% of all such sales on a dollar basis, and 7.7% of such sales on a unit basis, an absolute decline of 3.2% on a dollar basis and .6% on a unit basis, and a relative decline of 17% on a dollar basis and 7% on a unit basis (CX 226; RX 468). At the same time, Vendo, long the leading and dominant manufacturer of coin-operated vending machines, increased its percentage share of all such sales during this period from 24.2% to 28.5% on a dollar basis and 13.6% to 15.9% on a unit basis (CX 226; RX 468). Thus, after the acquisition, the decline in Seeburg/Cavalier's market share between 1963-1965 indicates that the acquisition conferred no undue competitive advantage on Seeburg/Cavalier to the detriment of other manufacturers.

218. Actually, most of the other manufacturers of coin-operated vending machines for whom record evidence was presented by complaint counsel increased their sales and

market shares between 1963-1965, including particularly the smaller manufacturers, such as Cornelius (2.1% in 1963 to 2.4% in 1965 on a unit basis; 1.4% in 1963 to 1.6% in 1965 on a dollar basis); LaCrosse (1.3% in 1963 to 2.0% in 1965 on a unit basis; 1.6% in 1963 to 2.5% in 1965 on a dollar basis); and Selectivend (.9% in 1963 to 1.6% in 1965 on a unit basis; 1.4% in 1963 to 2.4% in 1965 on a dollar basis) (RX 468, 417; CX 247, 100, 244 B).

219. A few vending machine manufacturers' share of all coin-operated vending machines sold in the United States declined between 1963 and 1965 (e.g., Canteen and Victor Products). However, their business was not lost to Seeburg Cavalier, whose own combined share of such sales declined in that period (RX 468; CX 226). Victor Products' Executive Vice President testified that there was "no" difference in Victor's ability to solicit sales for its bottle and can vending machines due to the challenged acquisition, since Victor and Cavalier did not solicit the same class of customers (Small, Tr. 1303-04).

220. According to the record evidence, competition among manufacturers of vending machines appears to have been enhanced rather than inhibited following the challenged acquisition.

221. In response to complaint counsel's question as to what he deemed "the greatest benefit of the merger" (Tr. 2083), William G. Raoul, President of the Cavalier Division of The Seeburg Corporation and former President of Cavalier Corporation, testified "[t]he fact that . . . Cavalier would have access to a line of general vending equipment which would enable us to compete with Vendo effectively in the National User market. Vendo had no competition in the field at that time" (Tr. 2083).

222. Likewise, Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, testified, on direct examination by complaint counsel, that the Cavalier ac-

quisition appeared to us to "be an opportunity for us to sell the Coca-Cola bottlers so that we could properly compete with our competitor", Vendo (Coleman, Tr. 2106), since "there was just one of our major competitors who sold Coca-Cola a full line and that was Vendo" (Ibid.).

223. According to the uncontroverted evidence of record, new and intensive competitive rivalry now exists for Vendo in the segments of the vending business involved in this case. Prior to the acquisition, Vendo dominated the full-line vending field with Coca-Cola bottlers and had the National Users business virtually "locked up" (Raoul, Tr. 2080; Coleman, Tr. 2106; Brinkmann, Tr. 1722). But now Seeburg/Cavalier also has a full line of vending equipment for sale to Coca-Cola bottlers, who have diversified into full-line vending and the National Users market, bringing additional competition in these changing segments of the vending industry (RX 487 L; Findings No. 174-178, 189). As Mr. Raoul testified on direct examination by complaint counsel, Cavalier's position with Coca-Cola bottlers "has been strengthened in the field of being able to offer our equipment in association with Seeburg equipment in the national user program" (Tr. 2084).

224. Illustrative of Seeburg's efforts and increased competition, the record indicates that in 1965, among others, Sinclair Oil has "joined our [Seeburg's] list of new oil company customers and has decided to test our oil company banks" in various locations (RX 451). In addition, Mobil and Texaco are using Seeburg equipment today and "there are many others interested" (Raoul, Tr. 2081).

225. According to evidence of record received without objection by complaint counsel, "[i]f Cavalier had not merged with Seeburg, neither Seeburg nor Cavalier would have been equipped to compete for this business, The Vendo Company would have received the [Mobil] order without contest". (RX 450 D).

226. Even though Seeburg Cavalier makes its own banks of vending machines available to oil companies, the "Vendo Beige color" is still frequently specified (RX 451; cf. Brinkmann, Tr. 1721-22).

227. The Seeburg Cavalier acquisition enabled Cavalier to "exhibit an oil company bank at the International Convention that [was] conducted by Coca-Cola" in 1965 (RX 452; cf. RX 397 A-B, 398 A-C). Along with the Cavalier cold drink machines, the bank of machines to be exhibited included a candy, cigarette and soluble coffee vender, all of which would not have been available to Cavalier prior to the challenged acquisition (RX 452).

228. Intensified competitive rivalry following the Seeburg Cavalier acquisition is reflected in a Vendo General Automatic Products Bulletin No. 76, dated July 13, 1965, entitled "Oil Companies", stating that while "Vendo has the lead in the oil company market, . . . Our competitors want the oil company business, and there isn't one of them who isn't calling on the oil companies trying to get it" (RX 399). It also indicated that "Seeburg is the most active at the present time and has a modular bank consisting of a Choice-Vend (Pepsi-Cola) or Cavalier (Coca-cola) bottle or can beverage vender . . . and the old Du Grenier (Williamsburg) cigarette, candy and instant coffee venders" (RX 399). Hence, in 1965, Vendo found it necessary to compare Seeburg Cavalier and Vendo machines concerning prices to oil companies and other national accounts (RX 395).

229. Similarly, 1965 Vendo documents demonstrate Vendo's concern that "We now have serious competition . . . Seeburg, Westinghouse and National are all calling on the oil companies. Seeburg has supplied Coca-Cola with literature and slides describing their service station bank, and Coca-Cola intends to show our literature and Seeburg's to all oil companies large and small" (RX 396 B).

CONCLUSIONS

I. Observations Concerning Evidence Generally as Related to Complaint Counsel's Case Theory

Complaint counsel are correct in their assumption that all types of vending machines as a whole constitute a relevant line of commerce and that bottle vending machines alone constitute a well-defined submarket within the overall vending machine market. As stated by complaint counsel in their brief in support of their proposed findings, within the broad market encompassing all types of coin-operated vending machines "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" *United States* v. *du Pont & Co.*, 353 U.S. at 593-595; *Brown Shoe Co.* v. *United States*, 370 U.S. at 325.

Complaint counsel are also especially correct in their further assumption that: "Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition in any line of commerce, it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." (*Brown Shoe Co.* v. *United States*, *supra*) However, complaint counsel overlook the fact that Cavalier, the acquired firm, was not mainly and principally engaged in the manufacture and sale of bottle vending machines prior to and at the time of the challenged acquisition except in the limited sense of manufacturing Coca-Cola bottle vending machines for sale to Coca-Cola bottlers exclusively. Whether or not one considers the manufacture and sale of vending machines to dispense bottled Coca-Cola as a submarket separate and apart from the bottle vending machine market, or as a segment of the same submarket, makes little difference economically or legalistically.

The evidence clearly indicates that before Seeburg's acquisition of Cavalier, Seeburg was partially excluded from competing in the bottle vending machine market since it could not obtain Coca-Cola's necessary approval to supply Coca-Cola bottle vending machines to Coca-Cola bottlers. In fact, Seeburg was totally excluded from competition in this segment of the market until its acquisition of Cavalier.

Having exhausted every effort to compete in the foregoing market through internal expansion, Seeburg was compelled to acquire Cavalier in order to overcome its partial exclusion from the overall coin-operated bottle vending machine market or its total exclusion from the coin-operated Coca-Cola bottle vending machine market, depending upon what semantics one applies to the nature of that market. The compelling need for the acquisition becomes even more crucial when one views this exclusion from the standpoint of a changing overall vending machine market which also made it necessary to diversify product lines particularly including Coca-Cola that was evidenced to be an essential line in diversified vending. The result of the acquisition was, therefore, not only to enchance competition but to permit competition that heretofore had not existed, whereby Seeburg could compete with Vendo, among others, that had been able to establish themselves in varying degrees in the Coca-Cola bottle vending machine segment of the market. It is impossible to conclude, as complaint counsel suggest, that Seeburg acquired a company with which it had unrestricted competition. The competitive obstructions are unequivocally clear.

The foregoing conclusion is supported by the *Brown Shoe Co.* case, *supra*, cited by complaint counsel, which states as follows:

> "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate

economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

The court in enunciating this guide line is applying the same realities to the nature or condition of the market as the Commission by taking cognizance of the fact that some Acquisitions may enhance competition to a desirable degree.

In the instant case, an examination of the competitive realities before and after the acquisition suggests that not only has competition been enchanced because of Seeburg's acquisition of Cavalier, but it has permitted competition in a crucial segment of the market that excluded respondent from effectively competing in the total market or markets at issue. Since Cavalier voluntarily limited itself to the manufacture and sale of Coca-Cola bottle vending machines, it had nothing to offer to respondent in the nature of making it more competitively effective in other segments of the bottle vending machine market except to permit it (respondent) to compete with other full-line vending machine manfacturers, such as Vendo, which appears to have been able to maintain its leadership in the market despite the acquisition. Significantly, other vending machine manufacturers appear to have maintained an approximate status quo with regard to their sales position in the market.

Complaint counsel appear to argue that all of the foregoing competitive realities are meaningless under *United States* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576, 594 (S.D.N.Y. 1958), because the acquisition in that case reduced the number of competitors despite the fact that the merger of the ninth and 53rd largest companies placed Bethlehem in a position to better compete with those companies having a higher percentage position in the market

than Bethlehem. This theory, however, overlooks the fact that in the case before us (Seeburg) there was a compelling need for the acquisition to permit competition previously excluded. Furthermore, as heretofore stated, Seeburg's competitors were not reduced in competitive effectiveness since Seeburg only acquired competitive ability in an area of competition evidenced to be closed to them prior to the acquisition. Proof of their efforts to pierce this anticompetitive obstruction through internal expansion before acquiring Cavalier is without contradiction. This evidence is particularly impressive in view of the fact, as heretofore stated, that the Coca Cola bottle vending machine market was evidenced (also without contradiction) to be a crucial segment of the bottle vending machine market in the overall vending machine market, requiring full line and diversified vending under the market leadership of The Vendo Company.

Complaint counsel's analysis to the effect that Seeburg had full line vending as well as Vendo before Seeburg's acquisition of Cavalier is entirely without merit since, as heretofore stated, the evidenced realities of the market in question indicate, also without contradiction, that the Coca-Cola vending machine segment of the market was crucially important in affording full-line competition to meet diversified product demand by supplying complete banks of machines. Obviously, Seeburg (as a manufacturer and seller of vending machines) did not and could not compete in a full-line market since it was denied entry into the Coca-Cola bottle vending machine segment of the market before acquiring Cavalier.

Resolution of the legality or illegality of an acquisition challenged under the Clayton Act's Section 7 may not be premised upon legalistic abstractions. At the termination of the hearing, the hearing examiner urged that the proposed findings and conclusions of counsel be rationalized on the basis of showing actual competitive effect of the

acquisition or the potential likelihood of such competitive effect in the specific market or markets at issue, supplemented, of course, by an application of the law in context with the evidenced material economic facts.

Complaint counsel urge that the same relief of divestiture be accorded in the Seeburg case as in many other cases cited. However, complaint counsel's proposed findings and brief fail to establish a rationalized relationship between the proposed findings and material issues in this case or to rationalize the applicability of the cases cited to the market facts evidenced in this case. Aside from the lack of assistance in this regard, or discussion of the law as it applies to the material issues concerning the market facts before the hearing examiner, an independent examination of the evidence leads one to the conclusion that the evidence adduced by complaint counsel supports the assumption that Seeburg's acquisition of Cavalier enhanced competition rather than destroyed it, either actually or potentially. This will hereinafter be more specifically analyzed.

II. Required Consideration of Competitive Realities Rather Than *Per Se* Rule Application to Incomplete Evidentiary Facts

In the first place, "[i]n every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. This burden is not met, in any case, by invocation of a talismanic *per se* rule by which to dispense with the need for adducing evidence of probable anti-competitive effect. Congress declared neither that all mergers, nor that mergers of a particular size or type, are *per se* unlawful. In every case the determination of illegality, if made, must rest upon specific facts." (*Procter & Gamble Co.*, Dkt.

6901, p. 22 (Nov. 26, 1963); see also *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1082 (1962)).

Moreover, a merger must "be functionally viewed, in the context of its particular industry" (*Brown Shoe Co. v. United States*, 370 U.S. 294, 321-322 (1962)).

Accordingly, while market share statistics may be a useful index of so-called "market power" or "concentration" in appropriate cases, "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger" (Id. at 322, n. 38).

Such market analysis presupposes identification and proof of a "relevant market" or "area of effective competition" since "substantiality [of competitive effect] can be determined only in terms of the market affected" (*United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957)).

As the late Judge Dawson stated in an important Section 7 decision dismissing a merger case, which the Justice Department never appealed:

> "Merely carving out a large segment of an industry as being the relevant line of commerce, without taking into account the competitive realities of submarkets, and merely adding the percentage of the business done by one company to the percentage done by another company does not establish that the effect of the acquisition may be substantially to lessen competition." (*United States v. Lever Bros. Co.*, 216 F. Supp. 887, 898 (S.D.N.Y. 1963))

See also *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 196 (S.D.N.Y. 1960) ("Statistics dealing only with rank and percentages do not by themselves suffice to describe whether the vigor of competition has been af-

fected"); Report of the Senate Committee on Antitrust and Monopoly, Concentration in American Industry, 85th Cong., 1st Sess. 4 (1957) ("Bare statistics necessarily omit many qualitative factors which are essential to a complete understanding of the competitive structure of the entire industrial economy or of an individual industry").

III. The Cavalier Acquisition as a Diversification Move Stimulating Competition

Measured against the foregoing principles, the testimony and other evidence of record in this case make it clear that whatever standards of proof may now apply where "horizontal" mergers of direct and substantial competitors are involved[9] this case, like the *Lever* case, cannot be adjudicated by

> "Carving out a large segment of an industry as being a relevant line of commerce, without taking into account the comparative realities of sub-markets, and merely adding the percentage of the business done by one company to the percentage done by another company . . ." 216 F. Supp. at 898.

For here any realistic analysis of the actual market facts of record will demonstrate that:

(1) No actual or potential competition existed between Seeburg and Cavalier at the time of the challenged transaction in 1963;

(2) In light of observable industry trends, the acquisition strengthened rather than lessened competition by en-

[9] Compare *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 331 (1963) (invalidating merger of second and third largest Philadelphia banks with combined assets of $1.75 billion); *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 272 (1966) (invalidating merger of directly competing Los Angeles grocery chains with combined sales of $172.5 million annually).

abling both Seeburg and Cavalier to diversify so as to serve customers they previously could not reach;

(3) Complaint counsel's inconclusive statistical proof cannot establish any adverse competitive effects; particularly when

(4) Competition in the vending machine manufacturing segment of the vending industry today is more vigorous than ever, with manufacturers enjoying a greater range of choice among customers, and customers, in turn, enjoying the benefits of wider choice among manufacturers.

IV. Status of Seeburg and Cavalier Competitively at the Time of Cavalier Acquisition in 1963

At the time of the challenged transaction in 1963, Cavalier and Seeburg served entirely different customer classes within the vending industry, each having long since been forced to recognize that they could not compete effectively for the class of customers served by the other.

Thus, as of 1963, Cavalier manufactured and sold bottle and/or convertible bottle/can vending machines exclusively to the bottlers of Coca-Cola, a specialized business which it had cultivated and enjoyed since 1934. (Findings No. 19, 21, 77, 88)

By contrast, Seeburg, through its Choice-Vend division, sold bottle and/or can vending equipment only to bottlers of soft drinks other than Coca-Cola—a distinct and separate group known as "trade bottlers", or "the other side of the street" in the industry. (Findings No. 50, 52, 54, 155).

More specifically, Cavalier in 1963 was one of five suppliers of upright Coca-Cola bottle and/or can vending machines "approved" by the parent Coca-Cola syrup company, and had long shared with the much larger Vendo Company and Westinghouse Electric Corporation the bulk of the

substantial business generated by Coca-Cola bottlers, who had aggressively pioneered the "cold bottle" vending machine market prior to and after World War II. (Findings No. 50, 53, 65, 70, 141; see also RX 474 and 475)

Moreover, the business of the Coca-Cola bottler customers was protected for these "approved" suppliers by Coca-Cola's equipment acceptance and approval policy as it existed from 1957 until 1966. That Coca-Cola's approval, which Vendo, Westinghouse, and Cavalier enjoyed, was essential to effective competition for the business of Coca-Cola bottlers, is shown by the fact that, on the basis of stipulated sales data, no nonapproved supplier of bottle or bottle/can vending equipment had more than token sales to Coca-Cola bottlers at any time between 1961 and 1965. (Findings No. 75, 76, 78, 83, 84).

Westinghouse, until the latter half of 1966, sold no machines to non-Coca-Cola bottlers. Vendo sold exclusively to Coca-Cola bottlers prior to 1956, and after a brief period of confusion and "misunderstandings" following its 1956 acquisition of Vendorlator,[10] set up a separate sales force selling the Vendo line exclusively to Coca-Cola bottlers while Vendo's Vendorlator division handled "trade" bottler sales. (Findings No. 78, 90, 91, 93, 210; see also Burlington, Tr. 1518-21; Selzer, Tr. 1546-49; Hansen, Tr. 1567-69; CX 65, pp. 7-9; RX 457, p. 19; 315; 316 C-D; 318 A-D; 450 C)

Unlike Vendo, Cavalier made no major acquisition of separate bottle vending manufacturing and sales facilities. Accordingly, Cavalier's 1955-57 attempt to sell to "trade" bottlers created sales and manufacturing problems which were too great in light of the meager results obtained. Cavalier therefore determined to and did concentrate its efforts after 1957 exclusively in the Coca-Cola field. (Findings No. 21, 180, 183)

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[10] See *In the Matter of The Vendo Co.*, 54 F.T.C. 253 (1957).

By contrast to Cavalier, Seeburg's Choice-Vend Division, from its inception in 1956 as Choice-Vend Corporation, had concentrated on the separate and distinct "trade" bottler segment of the vending industry—i.e., sales to bottlers other than bottlers of Coca-Cola (Miller, Tr. 1984; Findings No. 75, 86, 155).

At the time of the challenged acquisition in 1963, the "trade" bottler field, like the Coca-Cola field, was marked by parent syrup company equipment approval programs, and the existence of a specialized group of manufacturers who concentrated on sales only to "trade" bottlers—i.e., Choice-Vend, LaCrosse, Victor Products, Selectivend, and Vendorlator, which had in 1956 become a division of Vendo. (Findings No. 71, 72, 74, 75, 85, 86, 90)

Like Cavalier, Choice-Vend had made efforts to break out of its own field so as to be able to bid for the business of Coca-Cola bottlers. In fact, Choice-Vend and later Seeburg Choice-Vend repeatedly sent its equipment to Atlanta for testing and approval by Coca-Cola, but was repeatedly rejected. Finally, after a major sales presentation by Seeburg Choice-Vend to Coca-Cola in Atlanta in December 1961 led to a final turndown by Coca-Cola in February 1962 (RX 273), even though Coca-Cola was "confident" that "Seeburg would make a good supplier", Seeburg saw that it could not hope to compete for the business of Coca-Cola bottlers, and abandoned its efforts in this direction.

As of 1963, therefore, neither Seeburg/Choice-Vend nor Cavalier solicited the customers of the other. Moreover, the record refutes any inference or speculation that either would have or could have, after its past experience, attempted to reverse the competitive pattern, set by the large parent syrup companies, which effectively precluded such competition until 1966.

Furthermore, any contention that Seeburg/Choice-Vend and Cavalier as of 1963 were actual or potential competitors

is entirely without merit since Seeburg was excluded from the market segment Cavalier sold to.

V. The Effect of Seeburg's Acquisition of Cavalier Competitively

Irrespective of the traditional Coca-Cola "trade" bottler split characterizing the industry until 1966, the record further shows the existence of trends in the vending industry which made diversification by vending machine manufacturers a competitive must. Indeed such growth was particularly important for a relative newcomer such as Seeburg which had first entered the industry in 1958, and a single-line independent facing larger rivals such as Cavalier. (Findings No. 50, 52, 97, 103, 113, 122, 204, 210, 12, 19, 179).

Foremost among the important industry trends was the movement to "full-line vending" by both vending operators and soft drink bottlers. As detailed in the findings, this trend was based on the expansion of the vending industry generally in terms of total volume and number and type of items vended and favored the manufacturer who could provide matched banks of several machines vending different products, usually including, among others, soft drinks, candy, cigarettes, food and pastry. (Findings No. 97-112)

Contemporaneous with the "full-line vending" trend was the developing "National Users" market, featuring direct sales efforts at the national headquarters level of such customers as oil companies and other nonvending businesses, by both vending machine manufacturers themselves and parent syrup companies such as Coca-Cola, in an effort to place in service stations and other outlets matched banks of vending machines adapted to the National Users' specifications. (Findings No. 113-122)

Here again, to compete successfully for the business of "National Users", vending machine manufacturers need

the same type of matched banks of soft drink vending machines and associated equipment necessary to service bottlers and operators engaged in full-line vending. Moreover, the manufacturers must also enjoy good relations with the parent soft-drink syrup companies, particularly Coca-Cola, which has been most aggressive in cultivating this market. (Findings No. 115, 120-123, 125)

Underscoring the necessity of manufacturer diversification to meet the needs of their changing and expanding vending industry customers, Vendo recognized as early as 1956, even before respondent entered the industry, that "the expanding markets for automatic merchandising equipment had already forced us to embark on a plan of extensive diversification of our product line" (RX 316-D).

Accordingly, Vendo vigorously pursued a program of diversification, which included its 1956 acquisition of Vendorlator Company, a large bottle vending machine manufacturer (*In the Matter of The Vendo Co., supra* at 254). By the time of the challenged acquisition in 1963, Vendo had the position of industry leader, with a market share nearly twice as great as that of its nearest competitor, no matter how measured (i.e., on a dollar or unit sales basis). (Findings No. 90, 136-137)

Other instances of diversification shown in the record include Canteen Corporation, which acquired Rowe Manufacturing Company in 1955, and introduced a new line of matched bank vending machines in 1962, UMC's National Vendors subsidiary, which by 1963 had expanded its line of machines to include a "new 'Moduline' series of uniformly-styled machines for cigarettes, candies, hot foods, sandwiches and pastries" (CX 66, p. 7), and was continuing its emphasis on the "development of a 'full line' of vending machines" (CX 67, p. 4) and Westinghouse, which entered the "full line vending" field with a post-mix cup machine, a fresh brew coffee machine, a candy machine, and a tandem can vending machine in 1965 and 1966. (Finding No. 152)

Respondent also has particulated [sic] in this trend toward diversification among manufacturers, largely through the acquisition of "small", "unprofitable" and even "bankrupt" companies, and by 1963 its line included cigarette machines, coffee machines, cup soft drink machines, and bottle and can vending machines for non-Coca-Cola bottlers. (Findings No. 12-13, 36, 148-150)

Notwithstanding the competitive efforts of respondent and its other rivals, Vendo in 1963 still occupied a unique and dominant spot as the only manufacturer able to offer its full line of vending equipment to all segments of the vending industry. For, as of 1963, Vendo not only had the most complete line in the industry, but it was the only major full line manufacturer successfully selling both to the important Coca-Cola bottler segment of the vending industry, and also to the growing "trade" bottler segment, which Vendo served through its separate Vendorlator division, acquired in 1956. (Findings No. 90, 95-96, 140; see also Brinkmann, Tr. 1722; Coleman, Tr. 2106; Selzer, Tr. 1553-54; CX 226; 65, pp. 7-9; 11; RX 457, pp. 18-19; 454, pp. 19-22)

In fact, with Coca-Cola leading the way in the National Users' program, and Vendo the only approved Coca-Cola supplier able to offer the necessary full line vending equipment, Vendo by 1963 had this phase of the vending machine business "locked up". (Findings No. 109, 131, 174, 177, 188)

Thus, at the time of the challenged acquisition in 1963, Seeburg and Cavalier, which were not competitors, were faced with serious problems in their attempts to compete effectively with larger and longer entrenched competitors to serve the changing needs of customers in the vending industry.

For its part, Seeburg had been rebuffed in its attempts to serve Coca-Cola bottlers. Not only was Seeburg effec-

tively barred from selling bottle and can vending equipment to a large segment of the industry which was served by the leading and dominant Vendo, but it also found that it could not sell its other vending machines to Coca-Cola bottlers moving into full-line vending, or to National Users, which chose Coca-Cola as the preferred soft drink. (Findings No. 123, 131, 171, 172, 174, 177)

Thus precluded from effective access to Coca-Cola bottlers, Seeburg sought Cavalier only as "a last resort" (Tr. 2108; Finding No. 178).

Cavalier likewise foresaw a competitive dead end as a single line supplier of bottle can vending machines with no "associated equipment" to offer its Coca-Cola bottler customers diversifying into full-line vending, or to participate in the National Users' market. Thus, in the early 1960's, Cavalier had begun to look into the possibility of an association which would give it the opportunity to participate in this business which Vendo at that time had secured. (Findings No. 131, 187, 189)

Viewed in light of these industry realities, the Seeburg/Cavalier transaction in December 1963 was a natural and legitimate diversification attempt by the parties which could not, and did not, lessen competition.

From the standpoint of market structure immediately after the acquisition, the number of firms bidding for the bottle can vending machine trade of Coca-Cola bottlers and "trade" bottlers remained the same. Vendo, Westinghouse, and Cavalier, which now operated under its same management as a completely separate and independent division of Seeburg, continued to share the Coca-Cola bottler business. At the same time, Choice-Vend, LaCrosse, Selectivend, Victor Products, and Vendorlator continued in their traditional roles as "trade" bottler suppliers.[11]

[11] Cornelius, with a unique, low-cost horizontal vendor, served both segments of the bottler trade.

From a broader perspective, however, the acquisition created a more competitive market structure. For Seeburg/Cavalier was, for the first time, able to offer matched banks of machines to Coca-Cola bottlers engaged in full-line vending and to National Users, thus penetrating a field which Vendo had previously dominated. (Findings No. 131, 188-189, 223-229)

VI. Complaint Counsel's Statistical Proof as Related to the Market Facts

With industry realities detailed in this record so clearly showing the legitimate diversification and procompetitive effects of the challenged acquisition, it is doubtful even a strong statistical case would enable complaint counsel to carry their burden of proof to establish anticompetitive or monopolistic aspects of the acquisition. But here the statistical proof is so inconclusive, if not totally invalid, that its is manifest that complaint counsel have totally failed to prove their case.

Taking complaint counsel's own statistical exhibits at face value, notwithstanding their patent lack of relationship to the competitive realities shown in this record, they show that Seeburg was a distant second in the coin-operated vending machine field in 1963 with only 13.8% of dollar sales, to Vendo-Vendorlator's 24.2%. During the same year, Cavalier Corporation had 5.1% of the dollar sales, for a combined Seeburg-Cavalier total of 18.9% (CX 226).[12] (Findings No. 141, 217; see also RX 468 re unit basis.)

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[12] Larger percentages can be obtained based on complaint counsel's exhibit showing data for "coin-operated bottle vending machine" sales on a dollar basis (CX 225). But, in light of the demonstrated lack of competition between Cavaliers and Seeburg Choice-Vend, such statistics provide no valid measure of the acquisition's competitive impact. See *United States v. Ever Bros. Co., supra*, at 897-898. And, in any event, the so-called "bottle vend-

Whatever significance such statistical recitations might have in some other competitive setting, the plain fact is that they are totally meaningless in the overall context of this case.

Viewed on a unit basis in 1963, respondent was only fourth in the sale of coin-operated vending machines, with 4.5% of total sales to first place Vendo-Vendorlator's 13.6%. Cavalier, in fifth place, had a share of 3.8%—a "combined market share" of 8.3% for Cavalier and respondent (RX 468).

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ing machine" chart, which in fact includes data for convertible bottle can machines, again emphasizes the leading and dominant position of the Vendo-Vendorlator combine first created in 1956.

Entirely separate and apart from the Coca-Cola "trade" bottler split negating the competitive significance of "bottle vending machine" statistics, the record creates substantial doubt as to whether the so-called "bottle-vending machine" market is a realistic "area of effective competition" in which to analyze the competitive effects of this acquisition. Thus, bottle vending machines are merely one type of coin-operated machine regularly purchased and used by soft drink bottlers to dispense their products to the public. Moreover, many bottle and can machines are readily and inexpensively convertible to handle soft drinks packaged either in cans or in all types of bottles, and the same manufacturers both make and sell both bottle and can machines to the same class of customers (CX 247; RX 417). Under the recognized test of "reasonable interchangeability of use", *Brown Shoe Co.* v. *United States*, 370 U.S. at 325, therefore, it appears unrealistic to isolate "bottle vending machines" as a separate market, an economically meaningful separate market, submarket, or "line of commerce". For there is no evidence that bottle vending machines possess "peculiar characteristics and uses" to distinguish them from can vending machines, or that they are sold at significantly "distinct prices" to "distinct customers" by "specialized vendors" using "unique production facilities", so that the "practical indicia" which might make "bottle vending machines" as much an appropriate "submarket" are also lacking here, particularly in the face of evidence that "distinct customers"—i.e., Coca-Cola and "trade" bottlers—base their purchasing patterns on the identity of suppliers rather than the type of machines involved.

Moreover, taking both the unit and dollar sales statistics at face value, it is readily apparent that the challenged acquisition had no lasting effect either in enhancing respondent's competitive position to the detriment of other competitors (Cplt., ¶ 19(d)), or in increasing "concentration" (Cplt., ¶ 19(c)).

On a dollar basis, combined Seeburg-Cavalier coin-operated vending machine sales declined from 18.9% of complaint counsel's totals in 1963, to 15.7% in 1965—substantially smaller than Vendo-Vendorlator's 28.5%. (Finding No. 217)

A paralled trend was apparent on a unit basis, where Seeburg-Cavalier declined from 8.3% of all coin-operated vending machine sales in 1963 to 7.7% in 1965, and dropped to third place in the industry behind Vendo-Vendorlator with 15.9%, and UMC with 8.2%.[13]

Thus it is apparent statistically, as well as from a realistic observation of market trends, that competition in the vending machine manufacturing segment of the vending industry today is more vigorous than ever, with manufacturers enjoying a greater range of choice among customers, and customers, in turn, enjoying the benefits of wider choice among manufacturers.

VII. Applicable Law in Context with Industry Facts[14]

In light of the industry facts revealed by the record, existing Section 7 precedents provide no basis for a finding of illegality.

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[13] A similar decline for Seeburg and continued dominance by Vendo-Vendorlator is apparent from the so-called "bottle vending machine" statistics (CX 225; RX 469).

[14] i.e., manufacture and sale of vending machines, including bottle vending machines or Coca-Cola bottle vending machines, which are either a submarket of the general vending machine market or a crucial segment of that market.

In the first place, the cases involving "horizontal" mergers between large direct and actual competitors simply have no application to the facts of this case—where the acquired and acquiring companies not only did not compete, but were effectively foreclosed by customer policies and practices entirely beyond their own control from soliciting each other's customers.

And, in any event, from the viewpoint of realistic economic impact, it is difficult to compare this acquisition, involving relatively small fabricating companies with total 1963 sales and assets of $54.5 million and $36.2 million, respectively, for Seeburg and total 1962 sales and assets of $8.4 million and $7.2 million, respectively, for Cavalier,[15] in a small segment of the expanding $3.8 billion dollar vending industry (1965), with prior cases involving such mergers as those of the second and sixth largest steel companies (combined sales of common products, $1.5 billion) *United States* v. *Bethlehem Steel Corporation*, 168 F. Supp.

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[15] Even using Seeburg's 1965 assets of $85,908,696, which reflects substantial internal expansion (cf. CX 10, p. 4 with CX 39, p. 12), it ranks it among the smaller respondents sued by the FTC under § 7 since 1950. Indeed, per Chairman Dixon, 75% of the Commission's merger complaints to date have involved larger companies. See Testimony of Paul Rand Dixon, Chairman, FTC, before the Select Committee on Small Business, U.S. Senate, pp. 5-6, March 15, 1967. Although sales dollar size is not a governing factor in and of itself, these statistics suggest that perhaps in some degree they do bear some relationship to economic impact in some industries.

576 (S.D.N.Y. 1958),[16] leading companies in the can and glass container industries, which actively competed for the business of the same customers (total sales $645 million) *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964),

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[16] Underscoring the inapposite nature of these "horizontal" merger precedents in this proceeding, a detailed analysis of the *Bethlehem Steel* case, on which complaint counsel relied at the hearings (Tr. 2420), reveals the following salient facts:

1. The steel industry, involved in *Bethlehem*, is perhaps the most basic industry in the United States;
2. The merging companies in *Bethlehem* were the ninth and fifty-third largest companies in the United States in terms of sales;
3. In *Bethlehem* the merging companies both sold the same products largely to the same customers so that the merger eliminated substantial actual and direct competition;
4. *Bethlehem* also involved (a) adverse vertical effects; (b) a reduction in the number of fully integrated competitors; and (c) a great probability that the merged company would retain its share of the market; and
5. Finally, in *Bethlehem*, there was no compelling competitive need for Youngstown's absorption.

By contrast, in this case, the merging companies are small concerns acting as fabricators in a relatively small segment of the expanding and dynamic vending industry. They sold their products to different customer classes, so that no actual or direct competition was eliminated. Moreover, the acquisition created no adverse vertical effects, and, as part of a program for diversification to meet changing consumer needs, it actually increased the number of effectively diversified companies, rather than reducing the number of competitors as in *Bethlehem*. In addition, the decline in Seeburg/Cavalier's market share since 1963 refutes any probability that the company would, or could, retain its market position in the vending industry. Finally, Seeburg's need for the merger as a "last resort" to penetrate the Coca-Cola bottler market and Cavalier's need to associate with a more diversified company faced by five larger rivals, including Vendo which had diversified under the aegis of an FTC consent order, are far more compelling than any facts asserted in the Bethlehem-Youngstown situation.

the second and third largest banks in the city of Philadelphia (total assets $1.75 billion) *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), the acquisition by Alcoa, an adjudged monopolist, of a competitor, *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964), or even the merger of the third and sixth largest grocery chains in Los Angeles, whose total annual sales were $172.5 million, *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

Furthermore, unlike the central facts underlying the Supreme Court's rulings in the *El Paso* and *Penn-Olin* cases, *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), no trace exists in this case of impaired competition by the joinder of big "potential" competitors either "waiting in the wings" or sitting and "pondering" whether to move into competition in each other's markets (cf. 376 U.S. at 660-662; 378 U.S. at 173, 175-176; Supreme Court Brief for the United States in *Penn-Olin* case, p. 48).

In the first place, there can already be no comparison of El Paso—a billion dollar corporation protecting a monopoly position as the only out-of-state supplier for the $267 million annual natural gas business in the State of California—or of the rapidly expanding sodium chlorate business at stake in the Penn-Olin joint venture agglomerating assets of nearly one billion dollars, with the $11.8 million acquisition of Cavalier by Seeburg, then a $36 million corporation, in a market essentially dominated by Vendo.

More important, in this instance, the uncontroverted facts show that both Seeburg (Choice-Vend and Cavalier had long ceased "pondering" as to the desirability of broadening their lines by augmenting their distribution into the Coca-Cola and "trade" bottler business, respectively. As of 1963, Seeburg had unsuccessfully sought to enter the Coca-

Cola vending machine business, and Cavalier's efforts to move outside the Coca-Cola field had totally failed.

Thus, here there is no need for speculation as to the "eagerness, resourcefulness, or nearness" of alleged "potential" competitors (Beatrice Foods Co., Dkt. 6653, p. 32, April 26, 1965, noting that "[m]uch potential competition is simply too remote, speculative, or improbable to have demonstrable competitive significance").

As stated by respondent's counsel, neither Cavalier nor Seeburg/Choice-Vend by 1963 was "waiting in the wings". Each had already been ousted from the competitive stage. (Compare *United States* v. *Penn-Olin Chemical Co.*, 246 F. Supp. 917, 934 (D. Del. 1965) *prob. juris noted*, 35 U.S. L.W. 3277 (U.S. Feb. 14, 1967) (No. 760) after reviewing evidence of Pennsalt's business planning, District Court concluded it was "unlikely" that Pennsalt would have entered the relevant market on its own, so that the government had failed to carry its burden of proof in this Section 7 case.)

Finally, in the Commission's *Procter & Gamble* proceeding (Dkt. 6901 (Nov. 26, 1963), rev'd, 358 F.2d 74 (6th Cir. 1966), *cert. granted*, 385 U.S. 897 (1966)) concerning product diversification, the Commission's views in *Procter* provide no possible analogy to this case. (See also the decision of the Supreme Court, No. 342, October Term, 1966, dated April 11, 1967, affirming the Commission's order of divestiture.)

There the Commission predicated Section 7 illegality on the acquisition by Procter, the number one manufacturer in the household soap and detergent industry (and a major factor in other consumer product fields), with annual sales of $1.16 billion, of Clorox, the number one supplier of liquid bleach, with annual sales of $40 million.

Among the earmarks of Section 7 vulnerability detailed by Commissioner Elman's analysis were: (1) "the very

great discrepancy in size between Procter and, not only Clorox, but any firm in the liquid bleach industry" (Dkt. 6901, p. 53, Nov. 26, 1963); (2) the unhealthy market structure of the bleach industry, already dominated by Clorox, which dwarfed its smaller competitors (id. at 57-60); (3) Procter's position as the only significant potential competitor of Clorox (id. at 61); (4) Procter's "strong market position in other (and larger) industries, notably package detergents" which not only might enable it to transfer its "market power" to the sale of liquid bleach, but might also have an important adverse psychological effect on competitors and would-be entrants in the liquid bleach industry (id. at 62-64); and (5) the substantial advertising advantages to be gained by combining Clorox's advertising budget with Procter's to obtain maximum advertising and promotional savings (id. at 64-67).

In this case, the evidence not only shows that at the time of the acquisition in 1963 Seeburg could not have entered the Coca-Cola bottler field on its own, but, in any event, every element perceived as crucial by the Commission's *Clorox* opinion is absent. Furthermore, there is no inconsistency herein with the standards indicated by Justice Douglas in his opinion at page 8 of the *Procter & Gamble Co.* Supreme Court decision to the effect that the court of appeals relied too heavily in that case on post-acquisition evidence rather than on a prediction of the merger's impact at the time of the acquisition. In the instant case (Seeburg), post-acquisition evidence adduced by both complaint counsel and respondent's counsel merely confirms and corroborates the improbability of an anticompetitive impact established by pre-acquisition evidence. Such proof reflects: (1) the nature of a changing market requiring diversified full-line vending equipment of which Coca-Cola bottle vending machines were an integral part and (2) the compelling need for competition in this market which the acquisition foreseeably could, and did, accomplish.

No theories of "potential competition" can invalidate this acquisition, involving companies which operated in separate markets, and which had long since been excluded from each other's fields of competition.

The factually closest merger litigation, in some respects, resulted in a dismissal, which the Department of Justice did not even appeal.

Thus, in *United States* v. *Lever Brothers Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963), the court accepted the Antitrust Division's contention that the challenged acquisition by Lever of Monsanto's heavy-duty detergent product "All" had increased Lever's share of the heavy-duty detergent market from 16.8% to 22.4% and the share of the three leading firms in that market from 85 to 90% (id. at 897).

Nevertheless, in light of the "competitive realities" shown in the *Lever* record, the court declined to base its judgment on these statistics, and exonerated the acquisition.

In this connection, the court recognized that Monsanto's "All" was a "low sudsing detergent" which competed in this more specialized field, or "submarket", with comparable products of Procter & Gamble and Colgate-Palmolive, companies with a much wider range of consumer products than Monsanto. By contrast, Lever had no "low sudsing detergent", and its efforts to develop one internally had been unsuccessful and ceased the year prior to the acquisition. Therefore, Lever "needed a low sudsing detergent to round out its line of products" and "had the experience, expertise and organization to advertise, promote and sell a detergent product" in competition with Colgate and Procter, which Monsanto lacked (*U. S.* v. *Lever Bros. Co.*, *supra*, at 897).

By the time of trial, nearly six years after the acquisition, the court found "no evidence to support the position

that the acquisition of the "All" trademark by Lever Brothers or its introduction of new products has given it a dominant place in the detergent industry". (id. at 899-900). To the contrary, the combined Lever Monsanto market share which was 22.0% in the year prior to the acquisition had declined to 21.1% by 1960, still much smaller than the industry leader Procter & Gamble (id. at 900).

Notwithstanding the decline in Lever's market share, the evidence also showed that "All" had contributed substantially to Lever's earnings and "enabled Lever to increase the advertising and promotional support of its existing brands and to undertake the heavy expenditures required for the introduction of two new brands". (id. at 901).

As the court recognized, "[t]his is to the benefit of the consumer who may choose today among more and better detergents than were available in 1957" (ibid).

Similarly, in the Seeburg case, the market share statistics, which do not take into account "competitive realities", must give way to the facts which are strikingly parallel to those in the *Lever* situation.

Here, as in the *Lever* case, Seeburg needed Cavalier's Coca-Cola machines to round out its line after having tried and failed to enter this important segment of the business on its own (Findings No. 159-185). Moreover, like Lever, Seeburg faced a leading and dominant competitor, Vendo-Vendorlator, with a substantially greater market share (CX 226; RX 468).

Thus the Seeburg-Cavalier acquisition, like the Lever-Monsanto transaction, was essentially a diversification move which enhanced competition by making more different types of machines available to more classes of customers than ever before.

The decision feature of this case (i.e. Seeburg) is the pattern of a rapidly growing and changing vending machine manufacturing industry because of consumer demand for increasingly diversified vended products. To prevent (through divestiture or otherwise) any manufacturer of vending machines from providing a full line of equipment (consistent with consumer requirements) through merger if confronted with impossible internal expansion (as here) is to deprive the consuming public of a competitive market thereby contravening the major purpose of Section 7.

Therefore, on the facts evidenced, a Section 7 violation arising out of the Seeburg-Cavalier acquisition has not been established, either statistically or in the presence of market realities. Divestiture relief sought by complaint counsel would, if anything, inhibit competition rather than enhance it.

Accordingly,

ORDER

IT IS ORDERED that the complaint is herein and hereby dismissed.

EDGAR A. BUTTLE
Edgar A. Buttle
Hearing Examiner

May 22, 1967

APPENDIX H

Filed June 9, 1967

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8682

In the Matter of

THE SEEBURG CORPORATION,

a corporation

Correction of Initial Decision

In view of a clerical, inadvertent omission, it is

ORDERED that at page 106, line nine, of the initial decision in the above-entitled proceedings, dated May 22, 1967, the words "industry and" shall be inserted after the word "deprive".

EDGAR A. BUTTLE
Edgar A. Buttle
Hearing Examiner

June 8, 1967

APPENDIX I

Filed: August 9, 1967

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8682

In the Matter of

THE SEEBURG CORPORATION,

a corporation

Order Correcting Initial Decision (Second Correction)

Pursuant to Section 3.51(d)(2) of the Rules of Practice for Adjudicative Proceedings and in view of a clerical error involving a typographical omission in the Initial Decision at page 87, line 14,

IT IS ORDERED that the sentence commencing at line 13 of page 87 of the Initial Decision shall read as follows:

> This will hereinafter be more specifically analyzed as accurately contended by respondent's counsel supplemented by hearing examiner augmentation with the observation that regardless of the probative weight one assigns to complaint counsel's rather questionable proof of over concentration (in view of the rapidly changing relevant market and otherwise), such proof is not augmented by evidence of probable anti-competitive effect emanating from the merger at issue aside from elusive abstractions such as respondent's post-merger dollar and percentage of business increase, a general trend of acquisitions and decline in the number of firms in what appears to be a changing market in response to consumer demand for full line diversified product equipment of homogenious [sic] design for installation in complete banks. (See page 106).

EDGAR A. BUTTLE
Edgar A. Buttle
Hearing Examiner

August 9, 1967

APPENDIX J

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8682

In the Matter of

THE SEEBURG CORPORATION,

a corporation.

Order Correcting Initial Decision (Third Correction)

Pursuant to Section 3.51(d)(2) of the Rules of Practice for Adjudicative Proceedings and in view of a clerical error involving a typographical mistake in the above-captioned Initial Decision at page 94, third paragraph, line one.

IT IS ORDERED that the word "particupated" be changed to "participated".

EDGAR A. BUTTLE
Edgar A. Buttle
Hearing Examiner

August 16, 1967

[redacted]

In the Supreme Court of the United States

October Term, 1970

[redacted]

v.

Federal Trade Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 509

THE SEEBURG CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a–9a) is reported at 425 F.2d 124. The opinions and final order of the Federal Trade Commission (Pet. App. 15a–42a, 46a) are not yet officially reported.

JURISDICTION

The opinion and judgment of the court of appeals were entered on April 29, 1970 (Pet. App. 1a), and on May 21, 1970 the opinion was modified upon petitioner's petition for rehearing (Pet. App. 10a). The petition for a writ of certiorari was filed on August 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission adequately considered the findings of its hearing examiner when it reversed his determination that the merger of two leading manufacturers of soft drink bottle vending machines did not violate Section 7 of the Clayton Act.

2. Whether the Federal Trade Commission, upon ordering divestiture of a corporation acquired in violation of Section 7, may additionally prohibit any future acquisition of firms engaged in the same line of commerce for a specified period.

STATUTES INVOLVED

Pertinent provisions of the Clayton Act (38 Stat. 730, as amended, 15 U.S.C. 12–27) and the Administrative Procedure Act (60 Stat. 237, as amended, 5 U.S.C. (Supp. V) 551–559, 701–706) are set forth in the petition (Pet. 3–5).

STATEMENT

In 1963 the Seeburg Corporation, the nation's second largest full-line manufacturer of coin-operated vending machines and fourth largest manufacturer of coin-operated bottle vending machines, acquired the Cavalier Corporation (Pet. App. 29a–32a; CX 247,[1] in camera). At the time of the merger, Cavalier manufactured bottle vending equipment which it sold exclusively to independent franchisees or wholly owned bottlers of the Coca-Cola parent syrup company under the latter's vending equipment approval program. Cavalier had been an approved supplier since at least 1934

[1] "CX" refers to the Commission's exhibits before the Com-

(Pet. App. 25a, 74a). Cavalier ranked sixth in th overall vending machine market and third in th bottle vending machines submarket (Pet. App. 29a 32a; CX 247, in camera). Coca-Cola bottlers accounte for slightly more than half of all bottle vendin machine sales in 1963 (Pet. App. 20a).

Seeburg has attained its substantial market posi tion almost entirely through acquisitions (Pet. App 72a; J.A. 91, 660–70, CX 11, pp. 8–9). It entere the bottle vending machine market in 1969 throug the acquisition of the Choice-Vend Corporation, whic largely supplied bottlers other than Coca-Cola—so called "trade" bottlers (Pet. App. 82–83a).

To facilitate Choice-Vend sales to Coca-Cola bottler Seeburg sought approval of its machines from th parent Coca-Cola firm under its equipment approva program, but was repeatedly rejected (Pet. App. 23a 122a–124a). In 1962 Coca-Cola informed Seeburg tha under its criteria for approval, new suppliers would have to offer its bottlers better prices or quality, pro vide equipment not available from present supplier or otherwise save bottlers money on equipment pur chases (Pet. App. 23a–25a, 120a–121a, 122a–124a). Thereafter Seeburg abandoned any further attempt to gain Coca-Cola approval; it acquired Cavalie instead.

In 1966 the Federal Trade Commission issued complaint challenging the merger as a violation o Section 7 of the Clayton Act (Pet. App. 61a). Th

"J.A." refers to the Joint Appendix filed before the low court.

hearing examiner ordered the complaint dismissed (Pet. App. 61a–173a). He found that Seeburg and Cavalier were not in actual or potential competition because Coca-Cola's approval program separated competition for sales to Coca-Cola bottlers from sales to "trade" bottlers. (Pet. App. 149a–153a.) Since Seeburg had never persuaded the parent Coca-Cola company to approve its machines, and had abandoned any efforts to do so, and since Cavalier did not sell to "trade" bottlers, the examiner concluded that neither company was an actual or potential competitor of the other.

The examiner, in addition, found the merger to be beneficial to competition. There is a trend towards full-line vending operations featuring compatible "banks" of diversified vending equipment (Pet. App. 100a–102a, 113a–118a). The demand for these banks comes primarily from large national concerns, such as oil companies, who seek uniform equipment for their various business outlets (Pet. App. 106a–109a). Coca-Cola has been particularly active in this "National User" market. The examiner found that a manufacturer must be able to supply both "trade" and Coca-Cola bottlers with machines to participate fully in this market (Pet. App. 109a–113a). Prior to the merger, only the Vendo Co., the industry's largest firm (Pet. App. 29a), had access to both the

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He also found that Cavalier was "unsuccessful" in a two year attempt to sell to "trade" bottlers (Pet. App. 12a).

Cavalier's need to diversify in order to continue as an effective competitor was cited in partial justification of this merger (Pet. App. 127a–130a, 162a).

trade and Coca-Cola segments of the market. The examiner concluded that the merger of Seeburg and Cavalier was "a natural and legitimate diversification attempt" that would offer Vendo its only meaningful competition (Pet. App. 159a–163a).

On appeal by complaint counsel, the Commission unanimously reversed the examiner's determination (Pet. App. 15a–42a). It held that Seeburg and Cavalier were competitors in a submarket composed of bottle vending machines, whether sold to Coca-Cola or the "trade bottlers" (Pet. App. 22a, 24a). It found that Seeburg faced no "insuperable obstacles in selling to Coca-Cola bottlers or in securing approval from the parent company" (Pet. App. 25a); it noted that in 1963 Seeburg had sold 3 percent of all bottle vending machines purchased by Coca-Cola bottlers that year (Pet. App. 23a). Coca-Cola's approval requirements, it ruled, were simply the kind of demand for better price, innovation or performance upon which any customer insists before taking on a new supplier (Pet. App. 25a); the fact that a small firm, Cornelius, gained Coca-Cola approval for its innovative product in 1963 demonstrated that those conditions could be met (Pet. App. 26a). Seeburg's failure to obtain Coca-Cola's approval was not conclusive on the question of competition since "[u]nsuccessful bidders are no less competitors than the successful one." *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 661 (Pet. App. 24a).

Commissioner Nicholson did not participate because the case was argued before he was appointed (Pet. App. 42a).

The Commission noted that in 1966 Coca-Cola abandoned its approval program for a system of evaluation reports to be made available to all its franchisees. All reputable manufacturers were eligible to submit bottle vending equipment for evaluation. (Pet. App. 26a–27a; 13a, 134a–137a). This demonstrated that there was no "economic imperative" separating the Coca-Cola and trade bottle vending machine markets (Pet. App. 27a). In fact, the equipment supplied to all bottlers, the Commission noted, was identical except with respect to trademark and outside trim (Pet. App. 22a).

Turning to the competitive effects of the merger, the Commission found increasing concentration within both the market for vending machines and the submarket for bottle vending machines.[1] The overall market experienced a rapid decline in the number of manufacturers (Pet. App. 32a); the combined market shares of the top five firms increased from 67.1 percent in 1963—the year of the acquisition—to 73.7 percent in 1965 (Pet. App. 31a). Similarly, in the submarket for bottle machines the top five firms increased their share of sales from 78.3 percent to 84.4 percent over the same period (*ibid.*). The merger made Seeburg, with almost 25 percent, second in the bottle machine market, and enhanced its position in the overall market (Pet. App. 29–32a). The Commission concluded that the merger created a sufficient

[1] It also noted that the concentration figures it found would not be substantially different if can vending machines were considered together with bottle vending machines (Pet. App. 32a, fn. 12).

threat to competition to bring it within the prohibitions of Section 7 of the Clayton Act (Pet. App. 27a–36a).

It rejected the hearing examiner's findings that the merger was beneficial to competition because it would provide a stronger competitor for Vendo Co. (Pet. App. 36a–39a). The Commission found that both Seeburg and Cavalier could independently compete against Vendo and that approval of their merger might "endanger a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages sought by [the acquiring firm] in this case." *United States* v. *Continental Can Co.*, 378 U.S. 441, 464, (Pet. App. 39a).

The Commission dealt with the question of relief in a separate opinion after further briefing and argument. It rejected Seeburg's suggestion that the case be withdrawn from adjudication and settled by a consent order allowing Seeburg to retain Cavalier, barring it from further acquisitions for ten years and requiring it to grant nonexclusive, non-discriminatory licenses on Cavalier's patents. The Commission ordered complete divestiture. It also prohibited Seeburg from acquiring, for ten years "of corporations engaged in the manufacture and or sale of vending machines in the United States" without prior Commission approval (Pet. App. 43a–60a). Two Commissioners dissented on the ground that changed conditions in the industry made preferable acceptance of the proposed consent order.

The court of appeals unanimously sustained the Commission's order, but limited the prohibition against

further acquisitions to firms engaged in manufacture of bottle vending machines.

ARGUMENT

Petitioner does not directly challenge the Commission's decision that the merger of Seeburg and Cavalier violated Section 7 of the Clayton Act on the merits. It contends only that the Commission did not adequately consider the findings of the hearing examiner in reaching that decision and that the agency lacks power to prohibit certain future acquisitions as part of the remedy for the violation. The court below applied appropriate standards of judicial review to the Commission decision and decided the issues raised correctly. Its decision is not in conflict with other circuits. There is no reason for further review.

1. In reversing its hearing examiner, the Commission relied upon basic facts on which there was no fundamental disagreement (Pet. App. 15a). Its conclusion as to the legal significance of those facts and the standards of Section 7, however, differed from the examiner's. As a result of his erroneous view of the law, the examiner's ultimate conclusions as to the definition of the relevant market, and the actual and potential competition between the merging firms, were wrong. Given these errors, the Commission had both the power and the duty to correct them. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474; *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358.

Cinderella Career & Finishing Schools, Inc. v. *Federal Trade Commission*, 425 F. 2d 583 (C.A.D.C.),

upon which petitioner relies, is inapposite. The court of appeals there held that the Commission could not disregard extensive relevant testimony and the hearing examiner's findings that advertisements were not misleading and make a *de novo* determination that they were, particularly where the advertisements did not on their face disclose their capacity to deceive. 425 F. 2d at 585–588. By contrast here, the Commission gave an extensive, detailed and careful explanation of its reasons for reversing the hearing examiner's key findings concerning definition of the relevant markets, competition within them and the asserted procompetitive effect of the merger (Pet. App. 15a–42a). The large number of specific findings vacated by the Commission were either related to these basic conclusions or concerned post-acquisition evidence (*e.g.*, that the merged firms market share declined slightly) which the Commission deemed irrelevant (Pet. App. 40a). Cf. *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 599–601.

The opinion of the Commission was based on substantial evidence in the record. Its rejection of the examiner's conclusion that bottle vending machines sold to Coca-Cola composed a different submarket from machines sold to other bottlers is supported by the history of Seeburg's efforts to sell the same products to all of these bottlers. *See United States* v. *El Paso Nat. Gas Co.*, 376 U.S. 651, 661. Its conclusions as to the anti-competitive effects of the merger in a properly defined market are sustained by the industry positions of the two firms. See, *e.g.*, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 592 (concurring opin-

ion); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363; *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280. Its findings that the merger was not necessary to provide full-line competition for the industry leader is based on evidence that the merger did not broaden Seeburg's product line (Pet. App. 37a) and was not necessary for Cavalier to offer competition even with its limited line (Pet. App. 38–39a), cf. *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, and on the high risk that further mergers might be triggered by acceptance of such a justification. Cf. *United States* v. *Continental Can Co.*, 378 U.S. 441, 463–464.

The other cases petitioner cites do not support its contention that the lower courts are in conflict over the weight to be given by an agency to its examiner's findings. All those decisions recognize that the Commission may reverse or alter the findings of the hearing examiner so long as there is substantial evidence in the record as a whole to support this action, particularly where the factual issues do not turn upon the credibility of witnesses. Were the rule otherwise the statutory responsibility of administrative agencies to develop policy and give content to the broad terms of the statutes they administer would be restricted.

Both *Advertising Specialty National Association* v. *Federal Trade Commission*, 238 F. 2d 108, 113 n. 2 (C.A. 1), and *Maggio* v. *Federal Trade Commission*, 293 F. 2d 774, 776 (C.A. 9), recognize that a hearing examiner's findings not based upon the credibility of witnesses cannot be regarded as controlling. In *Soap-On Tools Corp.* v. *Federal Trade Commission*, 321 F. 2d 825 (C.A. 7), the Commission was reversed on one finding

2. Petitioner also contends that the Federal Trade Commission has only the power to order divestiture of a firm acquired in violation of Section 7 of the Clayton Act and not the additional power to prohibit any future acquisition of firms engaged in the same line of commerce for a specified period.[*] The identical issue is presented in the petition for a writ of certiorari now pending in *Abex Corporation* v. *Federal Trade Commission*, No. 146, O.T. 1970. The reasons set forth in the government's brief in opposition in

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because the question turned largely on credibility (321 F. 2d at 835) and others because the reviewing court found no evidence to support the findings of the Commission which rejected the examiner's. *Id.* at 833, 835, and 837. In *Burke Golf Equipment Corp.* v. *National Labor Relations Board*, 284 F. 2d 943 (C.A. 6), the court merely observed that a disagreement between a hearing examiner and the Board requires a more careful review of the record, and held that the Board's findings were not supported by substantial evidence. *Burke Golf Equipment Corp.*, *supra*, at 944. In *Minneapolis-Honeywell Reg. Co.* v. *Federal Trade Commission*, 191 F. 2d 786, 789-790 (C.A. 7), certiorari dismissed, 344 U.S. 206, the court followed the admonition of *Universal Camera* that the evidence must be assessed in light of the examiner's opportunity to observe witnesses and concluded, that the preponderance of the evidence supported the examiner. In *Art National Manufacturers Distributing Co.* v. *Federal Trade Commission*, 298 F. 2d 176 (C.A. 2), and *Goodman* v. *Federal Trade Commission*, 244 F. 2d 584 (C.A. 9), the courts correctly recognized that *Universal Camera* does not require the Commission to follow the examiner's findings, but only seeks to place such findings in their proper perspective in the court's review of the entire record.

[*] Petitioner proposed to accept a ten-year ban on further acquisitions of firms engaged in the manufacture or sale of soft drink vending equipment provided it could retain Cavalier (Pet. App. 49a).

that case[9] refute petitioner's contentions here and the Court is respectfully referred to them.[10]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Copies of the government's brief in opposition in *Abex* have been served upon counsel for petitioner herein.

[10] Statements in the brief for the United States in Opposition to Motions to Affirm in *United States* v. *duPont & Co.*, No. 55, O.T. 1960, p. 4, which appear to be contrary to the government's position as stated in the *Abex* case, do not represent the government's current view of the Commission's remedial powers.